

Contracts

Professor Terry S. Kogan

Spring Semester, 1998

Final Examination

Tuesday, May 12, 1998

1:00 p.m. to 4:45 p.m.

Examination Number: _____

This Final Examination is entirely open book. You may use the casebook, the Rules of Contract Law book, notes, outlines, and/or any other materials. The use of other human beings (or computers) is not permitted.

This examination consists of **three** questions. The value of each question and the time suggested for each is indicated.

You have **three hours and forty-five minutes** to complete this examination. **The first forty-five minutes is to be used exclusively for reading the questions carefully and outlining your answers. Blue Books will not be handed until forty-five minutes into the exam.** (If you are typing this exam, you are not allowed to type during the first forty-five minutes.)

Please write on every other line of the blue books.

Please put your examination number in the space provided above, on the outside of all blue books, and on all typewritten pages. **Do not write your name anywhere on this examination.**

You **must** return these examination questions with your answers.

Good Luck.

Statement of Facts for Question One

[This question will count 40% of the total examination grade. You should devote approximately 1 hour & ten minutes to it.]

On September 1, 1989, Orlando Owner (hereinafter "Owner") entered into a contract (hereinafter the "Contract") with Ben Builder (hereinafter "Builder") whereby Builder agreed to construct a new asphalt shingle roof on Owner's home for \$10,000. Owner lived in the Marina district of San Francisco. The Contract, drafted by Builder, stated in pertinent part:

Contract

. . . .

Clause 3. *Force majeure*. Neither party shall be held responsible if the fulfillment of any terms or provisions of this Contract are delayed or prevented by revolutions or other disorders, wars, acts of enemies, strikes, fire, floods, acts of God, or without limiting the foregoing, by any other cause not within the control of the party whose performance is interfered with, and which by the exercise of reasonable diligence, the party is unable to prevent, whether of the class of causes hereinbefore enumerated or not.

. . . .

Clause 8. To assure that Owner's home is not placed in peril by the onset of winter, all work under this Contract shall be completed by Builder on or before November 15, 1989.

Clause 9. Time is of the essence of this Contract.

Clause 10. This written Contract constitutes the entire agreement of the parties.

. . . .

Builder began construction of the roof on October 10, 1989. When the roof was 1/4 completed, an earthquake struck the city on October 17, 1989. The quake weakened the substructure of the roof, in effect rendering useless the work that Builder had completed. Builder immediately ceased working on the project.

[Note: Question One calls for advice from two different lawyers from facts presented from two different perspectives. While neither lawyer would know all the facts, each would be aware that different parties to a dispute will be likely to see things differently.]

Question One, Part (a)

You are a lawyer to whom Owner has come for advice. He relates the following: Shortly after Builder ceased working on the roof, Builder sent an invoice to Owner for \$3,500, seeking payment for the labor and materials which had been put into Owner's new roof prior to the earthquake. Owner has not yet paid that invoice.

Owner continues: Angered that Builder would seek payment for work that was of no value to Owner, Owner decided to hire a different carpenter to rebuild the roof's substructure (the scope of which work was *not* covered by the Contract between Owner and Builder), which involved removing all the roofing shingles (including the new portion that Builder had completed), rebuilding the substructure, and placing new plywood boards over the roof substructure. The reconstruction work was completed on December 1, 1989. On that day, Owner telephoned Builder to say that he could come in and put on the shingle roof that he had contracted with Owner to build. Owner assumed that Builder would honor the original Contract and construct the roof for the agreed upon contract price of \$10,000.

To Owner's great consternation, Builder responded as follows:

1. Builder stated that would not undertake to construct the roof unless Owner first paid him the \$3,500 for the work he had put in before the earthquake.

2. Builder stated that, given the earthquake, he was no longer obligated under the original Contract to build the roof. Builder explained that in general the demand for construction work has skyrocketed in the San Francisco area as a result of the quake. Specifically, he stated that the cost of both labor and materials had roughly doubled. Accordingly, Builder stated that, in addition to the \$3,500 payment for work previously done, he would now charge \$30,000 to build the roof.

Owner tells you that he felt Builder was extorting these payments from him, and taking undue advantage of the earthquake. Nonetheless, terribly worried that his home might suffer damage if it remained without a roof as winter approached, Owner begrudgingly agreed over the telephone to pay Builder \$30,000 to build the roof, and to pay Builder the \$3,500 for the work completed prior to the earthquake. Builder completed the roof on January 15, 1990. Builder has now submitted a bill to Owner for \$33,500.

Outraged at Builder's coercive tactics, Owner wrote Builder a check for \$10,000 (writing across its face "Payment in Full") and sent it to Builder.

Owner asks your advice as to whether he has a legal obligation to pay the entire bill for \$33,500. What advice do you give to Owner?

Question One, Part (b)

You are a *different* lawyer than the lawyer in Part (a). Builder has come to you for advice, and relates the following: He entered into the Contract to re-roof Owner's house in September, 1989, and was approximately one-quarter finished with the roofing work when the October 17th earthquake struck. Builder was forced to discontinue the work because the earthquake had severely damaged the roofing substructure, requiring that extensive additional carpentry work be done to reinforce the substructure before the actual roofing work could be started over again. Builder explained that he assumed he was entitled to be paid for the time and materials he had already put into the project, and invoiced Owner for \$3,500 in early November 1989.

Builder further explained that, for some reason unknown to him, Owner had hired someone else to rebuild the roofing substructure (though Builder regularly did such work in his line of business). Moreover, Owner did not pay the \$3,500 invoice for the work previously performed by Builder.

Builder did not hear from Owner during the remainder of November. Builder therefore assumed that Owner had made other arrangements to have his roof rebuilt, given that he had already hired someone else to repair the damaged roof substructure, and given that Owner's Contract with Builder required the work to have been completed by November 15th.

To Builder's great surprise, on December 1st, Owner telephoned him demanding that Builder put a roof on in accordance with the original Contract. Builder did not want to do so because he was angry that Owner had contracted with someone else to repair the substructure, and also because Builder had fully committed his construction crew to other projects in the interim. To undertake the job for Owner would thus require Builder to purchase extra materials and to hire additional workers, all at inflated prices resulting from the tight construction market following the earthquake. (The cost of labor and materials had roughly doubled after the earthquake.) In addition, Builder would have to pay some of his supervisory personnel overtime to supervise the work of the new temporary employees he would be forced to hire. Builder admitted that he demanded an inflated price to do the job for Owner because he did not want to do it and he did not think he was legally obligated to do so. He was somewhat surprised when Owner agreed to pay the amount he asked rather than negotiating for a lower rate. However,

because Owner agreed to pay \$30,000 for the new roof as well as the \$3,500 for the earlier work Builder had done, Builder agreed to do the job.

Because Owner had agreed to pay top dollar, Builder had given priority to doing the work for Owner and had put his top crew to work on that job, postponing other projects which had previously been scheduled. When the work on Owner's roof was completed, Builder sent Owner a bill for \$33,500. Instead of paying it, however, Owner sent Builder a check for \$10,000, and written across the face of it, "Payment in Full." Builder has not cashed the check and wants to know what his legal position is with respect to getting the remaining money that he believes Owner owes him.

What advice would you give Builder on his rights?

Question Two

[This question will count 20% of the total examination grade. You should devote approximately thirty-five minutes to it.]

Carl Crewcut was a career member of the United States Air Force, stationed at Hill Air Force Base in Utah. In January 1997, Crewcut decided to purchase a time-share in the Slippery Slope condominium project in Park City, Utah. Specifically, he purchased the ownership of a property interest: the ownership and right to use Condominium #12 for the third week in November of each year in perpetuity. In total, there were 25 condos in the project, all identical to Crewcut's Condominium #12. Crewcut entered into a written Agreement concerning the time-share with Slippery Slope Condominium Development Corp., the real estate developer.

The cost of a one-week time-share was \$25,000. Of this amount, \$3,000 was profit to Slippery Slope Condominium Development Corp.

On February 1, 1997, Crewcut made a \$2,000 down payment towards the time-share. One week later, and before paying any additional money towards the purchase price of the time-share, Crewcut was notified by the Air Force that he was being transferred to Germany. Accordingly, he sent a letter to Slippery Slope Condominium Development Corp. requesting that his down payment be returned. By return letter, the real estate developer refused to return his down payment.

Two weeks later, the real estate developer sold the time-share for the third week in November in Condominium #12 to another buyer for the same price that Crewcut had agreed to pay. At the time of the sale, however, the time-share covering the period for the third week in November remained unsold in 10 of the 25 condominium units. Moreover, at the end of 1997, there remained a total of over 100 unpurchased weeks in the entire time-share project. In such projects, it is typical in the industry that many time-share units remain unsold.

In early January 1998, Carl Crewcut filed an action against Slippery Slope Condominium Development Corp. to recover his \$2,000 deposit. To his surprise, the developer not only denied liability; it counterclaimed to recover the remaining \$1,000 of the \$3,000 that it stood to make in profit on the sale of the time share.

You are the judge to whom the case is assigned. The case has been submitted to you on cross-motions for summary judgment. All facts have been stipulated to by both parties. Write a Memorandum Opinion deciding the cross-motions for summary judgment.

Question Three

[This question will count 40% of the total examination grade. You should devote approximately 1 hour & ten minutes to it.]

Buyer Realty Corp. ("Buyer") wanted to invest in an office building. In the Spring of 1981, it approached Seller Development Company ("Seller"), which was planning to construct a 60-story office tower in downtown Seattle (the "Building"). Buyer and Seller entered into a contract (the "Contract") with respect to Buyer's purchasing the proposed Building from Seller. The Contract provided in pertinent part:

Contract

Clause 1. This Contract is entered into between Seller Development Company ("Seller") and Buyer Realty Corp. ("Buyer") with respect Buyer's purchasing the Building in downtown Seattle, Washington.

. . . .

Clause 5. Buyer agrees to pay Seller the purchase price for the Building and take title and possession to the Building at a closing, which will take place within 30 days after completion of the Building.

. . . .

Clause 18. The Seller hereby acknowledges that, as a condition to Buyer's obtaining financing for this purchase, Buyer needs prior commitments to lease space. According, Seller hereby authorizes Buyer to obtain, prior to closing, commitments with respect to the leasing of space in the Building.

Clause 19. Seller hereby agrees to complete

construction of the Building, and to have the Building completed and ready for occupancy, on or before June 1, 1983. Seller acknowledges that the Building's completion and readiness for occupancy on or before June 1, 1983 is a condition to Buyer's obligations under this Contract. Seller further acknowledges that the Building's completion and readiness for occupancy by said date is necessary to enable Buyer to complete its financing and to lease space within the Building for tenant occupancy beginning on August 1, 1983.

Clause 20. Upon completion, the Building is subject to inspection by Buyer's duly appointed architect and engineer to enable Buyer to determine that construction has been performed in compliance with all plans and specifications. Issuance of a "Certificate of Compliance" by said architect and engineer is a condition to Buyer's obligations under this Contract.

Clause 21. The parties hereby agree that the closing of the purchase and sale under this Contract shall occur on or before July 1, 1983.

Clause 21. Time is of the essence of this Contract.

. . .

Prior to entering into the Contract, Buyer obtained a commitment letter from Tenant Insurance Company ("Tenant") expressing Tenant's intention to enter into a long-term lease for half of the space in the Building. That commitment letter provided that Tenant could move into its space no later than August 1, 1983.

Buyer also obtained a commitment letter (the "Letter of Commitment") from Lender Bank ("Lender") stating that Lender would lend Buyer the purchase price and, in return, take a mortgage on the completed Building. The Letter of Commitment provided in pertinent part:

Letter of Commitment

This Letter of Commitment is entered into between Lender Bank ("Lender") and Buyer Realty Corp. ("Buyer") with respect Buyer's obtaining financing for purchase of the Building in downtown Seattle, Washington.

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Clause 6. It is a condition of this Letter of Commitment that, by the date of the closing of this loan, Buyer have lease commitments for not less than 30% of the space in the Building.

Clause 7. It is a condition of this Letter of Commitment that Buyer engage an architect and engineer to supply Lender with a Certificate of Compliance stating that the Building has been inspected and complies with all plans and specifications. The Certificate of Compliance must be delivered to Lender no later than three (3) days prior to closing.

Clause 8. This Letter of Commitment expires on August 15, 1983.

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A number of minor problems combined to put construction well behind schedule. Nevertheless, in December 1982, Buyer finalized the lease with respect to Tenant's renting half of the Building's office space. At Tenant's insistence, the lease required that the space be available for occupancy on or before August 1, 1983.

In mid-April 1983, Seller's General Manager telephoned Buyer's President to discuss the delays. The following exchange took place:

Seller's General Manager: "You're not going to hold us to that June 1st date are you?"

Buyer's President: "Not if you complete the Building in time to let us go ahead with our lease to Tenant and our mortgage arrangements with Lender."

On June 6, 1983, Seller notified Buyer that the Building would be completed and ready for occupancy by June 15th. Buyer's architect and engineer inspected the Building on June 16th and discovered that the central air conditioning system did not conform to the plans and specifications. Seller

was immediately notified and made prompt arrangements to fix the problem. Unfortunately, extensive changes that would take approximately a month were required. Accordingly, Seller's General Manager called Buyer's President to inform her of the additional delay. Buyer's President responded by pointing to the problems that any further delay would cause, and urged that repairs be done as expeditiously as possible.

Meanwhile, things were not going so well with Tenant. On July 20th, Buyer's president learned that Tenant was getting ready to file for bankruptcy. If Tenant went into bankruptcy, Buyer's lease with Tenant would be worthless. Moreover, if the bankruptcy took place before the closing, Lender would probably refuse to go through with the mortgage loan, since Buyer did not yet have a sufficient number of other tenants to occupy 30 per cent of the Building, as required by Lender's Letter of Commitment. There simply was not enough time to obtain alternative financing or additional tenants. Thus Buyer decided to undertake a two-pronged strategy: It would first try to complete the closing and thus obtain the mortgage loan before Tenant went into bankruptcy. Alternatively, it would attempt to use Seller's delays as an excuse to get out of the Contract.

On July 22, 1983, Buyer's lawyer sent Seller a registered letter which stated in pertinent part:

. . . In order for our tenants to move in on August 1st pursuant to our lease commitment, the closing with respect to the Building must take place no later than July 31st. Since it will take 2 days for the architect and engineer to inspect and prepare the Certificate of Compliance, and the Lender requires the Certificate of Compliance three (3) days before closing, the Building must be completed and ready for inspection no later than July 26th. In the event that you fail to have the building completed and ready for inspection on that date, Buyer will regard Seller to be in total breach of the Contract, and Buyer will consider itself to have no further obligations under the Contract.

Seller's lawyer immediately telephoned Buyer's lawyer to assure Buyer that the work would be completed as soon as possible, and that a re-inspection by Buyer's architect and its engineer should be scheduled for August 2nd. Buyer's lawyer responded that this would be too late to meet its requirement that the premises be available for occupancy by Tenant on or before August 1st.

On July 31st, Seller notified Buyer by registered mail and by fax that the repairs on the air conditioning were completed, and that the Building was ready for inspection and occupancy. On the prior day, Buyer had learned that Tenant would file for bankruptcy on August 2nd, and had no intention of

taking possession of office space. Buyer therefore responded to Seller's registered letter with its own registered letter stating that it was now too late for an inspection to cure Seller's breach, and that Buyer viewed Seller to be in total breach of the Contract. A lawsuit ensued in which each party sought damages from the other.

Discuss the contentions each party would make to support its claim that it was not in breach of contract and the other party was. Which party should prevail? What would be the appropriate measure of damages for each of the parties if that party prevailed?