LAW ADVOCATE GROUP, LLP

9701 Wilshire Blvd. Suite 1000 Beverly Hills, CA 90212

Phone: 310-651-3065 Fax: 310-601-7110

www.LawAdvocateGroup.com

Doron F. Eghbali Contracts Law

Breach of Contract In California

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Breach of contract is a rather nebulous term with multi-layered tentacles. In fact, what is a breach? When did the breach occur? Who breached the contract? What are the damages for the breach? Theses are only some of the myriad of questions posed when litigating or entertaining to litigate a breach of contract action. This article preliminarily explores such questions and attempts to shed light on such seemingly simple yet esoteric subject matter.

FULL PERFORMANCE OR PARTIAL PERFORMANCE OF CONTRACT?

A) FULL PERFORMANCE

California Civil Code Section 1473 provides in pertinent part that full performance of an obligation, by the person whose duty is to perform, or by any other person on his or her behalf, and with his or her assent, extinguishes the obligation, if accepted by the creditor. Despite several vital conjunctions and conditional clauses in the preceding code section, it is partially clear full performance often equates discharge of contractual obligations.

Nonetheless, the timing and method of satisfying contractual obligations are as equally important. In fact, in *Nguyen v. Calhoun* (2003) 105 CA4th 428, 439, 129, CR2d 436 the Court held that full payment of sums secured by deed of trust that lender received 3 days after foreclosure did not the obligation, hence the foreclosure sale could not be set aside.

Similarly, *California Civil Code Section 1475* provides that an obligation in favor of several persons is extinguished by performance rendered to any one of them. Nonetheless, see *Hurley v Southern Cal. Edison Co.* (9th Cir 1950) 183 F2d 125, the Court commented this code section should apply only if: the obligor (the person obligated to perform) can rightly assume that the obligee (the person to whom the performance is rendered) will account to the other obligees.

ELEMENTS OF BREACH OF CONTRACT

In CA, the Plaintiff must prove at least four elements to prevail on a breach of contract cause of action:

1. Existence of Contract;
2. The Plaintiff's Performance or Lack of Performance due to an Excuse;
3. The Defendant's Breach of the Contract; and
4. The Plaintiff's Damages As A Result of Defendant's Breach of Contract.

NEED TO DEMAND PERFORMANCE UNDER THE CONTRACT

Unless there is an unconditional time frame for performance, the Plaintiff should first demand performance before initiating a lawsuit against Defendant. If there is no time stated for performance, then the Defendant is not in breach unless and until a demand for payment has been made and refused by the Defendant. Nonetheless, there is one exception to the latter requirement: If as the result of Defendant's delay in performance, Plaintiff has suffered to the extent the performance had become valueless to the Plaintiff AND Defendant knew the delay would render performance valueless. See *Leonard v. Rose* (1967) 65 C2d 589.

TOTAL OR PARTIAL BREACH OF CONTRACT

Breach of contract could be total or partial. Total breach is when one party completely fails to perform obligations under a contract . On the other hand, partial breach is when one party to a contract partially fails to perform obligations under a contract. Even though the concepts of partial and total breach are often conflated, total and partial breach have disparate legal implications. To understand the legal implications of such concepts, it is critical to ascertain two other concepts, "material" breach and "immaterial" breach.

MATERIAL BREACH OR IMMATERIAL BREACH OF CONTRACT

If breach of an executory contract is found to be material, then such material breach excuses performance of the contract by the non-breaching party and could constitute grounds for rescission. On the other hand, an immaterial breach of contract does NOT excuse performance by the non-breaching party, but it only gives rise to damages.

Now, a total breach is a material breach and thus grounds for rescission of contract. On the other hand, NOT all partial breaches are material breaches. The Court in *Integrated, Inc. v. Alec Fergusson Electrical Contractor (1967) 250 CA2d 287*, stated that "[i]f the covenant be of minor importance, not going to the root of the matter, and one that can be readily compensated in damages, the party injured cannot rescind, but must perform his part of the contract and seek compensation in damages."

Hence, it becomes critical to ascertain what constitutes material breach. The Court in *Sackett v. Spindler (1967) 248 CA2d 220*, set forth some factors in determining whether a party's partial breach constitutes material breach:

- The extent the injured party receives benefit under the contract that the injured party has reasonably anticipated;
- The extent the injured party may be compensated for the damages incurred because of the breach of the contract;
- The extent the breaching party has already performed or has made preparations for performance.
- The level of hardship on the breaching party;
- The willful, negligent or innocent failure to perform by the breaching party;
- The level of uncertainty that the breaching party will perform the contract.

TIME OF BREACH OF CONTRACT

There is no breach of contract until time for performance has arrived. Even when the time of performance has arrived, there is no action for breach of contract, unless there are damages.

Threats of non-performance before the performance is due give rise to another legal concept "anticipatory repudiation".

ANTICIPATORY REPUDIATION

Even though, generally, there is no action for breach of contract until the time for performance is due and a party to an executory contract fails to perform, if a party breaches the contract by implication or otherwise, the non-breaching party could invoke "anticipatory repudiation". Anticipatory repudiation allows the non-breaching party to stop performing and bring an action for damages against the breaching party even though the time has not yet arrived for the "breaching party" to perform.

Anticipatory Repudiation has been codified in California Civil Code Section 1440:

"If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

A) EXPRESS OR IMPLIED REPUDIATION

As stated earlier, Anticipatory Repudiation could be express or implied.

Express repudiation is a "clear, positive, unequivocal refusal to perform", see *Taylor v. Johnston (1975) 15 C3d 130*. In other words, the other party alleged to have breached/repudiated the contract must have done in clear terms, by a positive act or statement that he or she cannot or will not substantially perform the essential terms of the contract, see *Machado v. Machado (1961) 188 CA2d 141*. Accordingly, mere indication of uncertainty would not be probably sufficient.

Implied repudiation, on the other hand, "results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." See, *Taylor v. Johnston (1975) 15 C3d 130*.

B) NON-BREACHING PARTY'S OPTIONS AFTER ANTICIPATORY REPUDIATION

1. **Terminate the Contract:** The non-breaching party could terminate the contract and immediately seek damages for breach.
2. **Wait and See Approach:** The non-breaching party could treat the repudiation as a bluff and wait until the performance is due. In such scenario, the non-breaching will not lose contractual rights to sue for breach.
3. **Try to Resolve:** The non-breaching could also attempt to resolve amicably the issues leading to the anticipatory repudiation with the breaching party. If such attempts do not result in cancellation, modification or repudiation of the contract, then the breaching party could still bring a lawsuit for anticipatory repudiation.

DAMAGES IN CONTRACT LAW

SOME BACKGROUND

Damages in contract law are designed to restore the injured party to the position the injured party would have been if the breaching party had fully performed the contract.

In California, the general measure of damages for breach of contract is codified in *CA Civil Code section 3300:*

'For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

A) "FORESEEABILITY"

One of the requirements to seek damages in a contract breach is foreseeability. Such concept has been codified in the CA Civil Code Section 3300, stated above. CA Civil Code Section 3300 incorporates "proximity caused thereby" and "be likely to result therefrom". Such language denotes foreseeability. In fact, in the rather famous case of *Hadley v Baxendale* (1854) 9 Ex 341, 156 Eng Rep 145, the Court explains:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

The underlying principle of foreseeability seeks to fairly allocate risks between parties. If the breaching party could not have reasonably foreseen the damages caused by the breach of the contract, then the risks could not have been initially allocated between the parties to the contract fairly.

B) "REASONABLENESS"

The requirement of reasonableness for breach of contract damages is mandated by *California Civil Code Section 3359*.

This section in pertinent part provides: "[d]amages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

C) "REASONABLE CERTAINTY"

Reasonable certainty means speculative damages are not allowed in damages for breach of contract. *CA Civil Code Section 3301* enshrines such concept and provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

This is important to note that even though the damages must be ascertainable, the amount of damages may be a reasonable approximation. The Court in *Acree v. General Motors Acceptance Corp. (2001) 92 CA4th 385*, stated that: " the amount of damages need not be proven with absolute certainty if the fact of damage is clear."

GENERAL DAMAGES AND SPECIAL DAMAGES

a) GENERAL DAMAGES: Damages for a breach of contract could be categorized as either General or Special damages. General damages are those damages that directly and necessarily flow from breach of contract. Since General damages are often natural and necessary consequences of breach of contract, General damages should have therefore been reasonably contemplated by the parties at the time of entering into the contract.

b) SPECIAL DAMAGES: On the other hand, Special damages are not directly and necessarily arise from the breach of contract. Special damages derive from the secondary or unique circumstances of the parties actions or in-actions. For the injured party to recover special damages, the breaching party must have known about or been communicated to about the special circumstances at the time the parties entered into the contract.

The Court in *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist. (2004) 34 C4th 960,* enunciated that "a party assumes the risk of special damages liability for unusual losses arising from special circumstances only if it was 'advised of the facts concerning special harm which might result' from breach—it is not deemed to have assumed such additional risk… simply by entering into the contract."

DISCLAIMER:

This article NEITHER supplants NOR supplements the breadth or depth of such rarefied topic. In fact, this article ONLY provides a rudimentary synopsis of such esoteric subject matter.

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DORON EGHBALI *is a Partner at the Beverly Hills Offices of Law Advocate Group, LLP. Doron Primarily Practices Business, Real Estate and Entertainment Law. Doron Can Be Reached at: 310-651-3065. For More information, Please, Visit: HERE.*