CHAPTER TWENTY THREE

CONTRACTS

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INTRODUCTORY NOTE ON INSTRUCTIONS FOR CONTRACT CASES

This Chapter containing the instructions for contract cases is organized into the following five subparts: 1) Formation of Contracts, 2) Interpretation, 3) Breach, 4)
Defenses, and 5) Remedies. These instructions are intended to set out the general principles of the law of contracts, and many of them will need to be modified for particular types of contracts, such as contracts for the sale of goods, leases, construction contracts, and employment contracts.

As in other types of cases, the trial judge should begin the jury instructions in a contract case with the appropriate General Instructions in Chapters 1 through 3, and then select those instructions from this Chapter that are pertinent to the contested issues in the case. In most cases it will be necessary for the trial judge to give Instruction No. 2.1 in order to focus the attention of the jury on what is in dispute in the case and on the law that the jury will need to apply. The court should include, where necessary, an explanation of the alignment of the parties, particularly in a case involving an assignment, delegation, or a third party beneficiary. Following that the judge should give the following general Instruction on the elements of a claim for breach of contract:
Instruction No. 23.1

ELEMENTS OF A CLAIM FOR BREACH OF CONTRACT

[Plaintiff] is required to prove by the greater weight of the evidence the following in order to recover on the claim for breach of contract against [Defendant]:

1. Formation of a contract between [Plaintiff] and [Defendant];

2. [Defendant] breached the contract by [state the way in which the plaintiff claims the breach occurred]; and

3. [Plaintiff] suffered damages as a direct result of the breach.

Comments

Although there are no Oklahoma cases listing the elements of a claim for breach of contract, the elements listed above are found in cases from other jurisdictions. See, e.g., Thompson v. Phillips Pipe Line Co., 200 Kan. 669, 438 P.2d 146, 149 (1968) ("In stating a claim on contract, the pleader should allege the making of the contract, its terms, and the breach thereof, which must not be left to inference."); Gilomen v. Southwest Mo. Truck Ctr., 737 S.W.2d 499, 500-01 (Mo. App. 1987) ("To state a cause of action for breach of contract, a plaintiff must allege (a) the making and existence of a valid and enforceable contract between the plaintiff and the defendant, (b) the right of the plaintiff and the obligation of the defendant thereunder, (c) a violation thereof by the defendant, and (d) damages resulting to the plaintiff from the breach."). See also Cleland v. Stadt, 670 F. Supp. 814, 816 (N.D. Ill. 1987) ("In a contract action, the plaintiff must allege the formation of a contract, the terms of that contract, performance by plaintiff, breach by defendant, and damages."); Stration Group, Ltd. v. Sprayregen, 458 F. Supp. 1216, 1217 (S.D.N.Y. 1978) ("The elements essential to pleading a breach of contract claim are: (1) the making of an agreement; (2) due performance by plaintiff; (3) breach thereof by defendant; and (4) causing damage to the plaintiff.").
PART ONE --- FORMATION OF CONTRACTS

Introduction No. 23.2

FORMATION OF A CONTRACT

A contract is an agreement to do or not to do a certain thing.

In order to have a valid contract there must be:

1. An offer by one party,

2. An acceptance by the other, and

3. Each party must give something of value or promise to give something of value in exchange for what the other gives or promises.

Notes on Use

This Instruction introduces the other Instructions in this Part One on Formation of Contracts.

The second paragraph should be given only if the contract's existence is in issue. If the existence of the contract is not in issue, the judge should give only the first paragraph of this Instruction, identify the contract for the jury, and then give the appropriate Instructions from Parts Two through Five of this Chapter.

Comments

15 O.S. 1991 § 1 (1991) defines a contract as follows: "A contract is an agreement to do or not to do a certain thing." 15 O.S. 1991 § 2 lists the requisites of a contract as follows: "It is essential to the existence of a contract that there should be: 1. Parties capable of contracting. 2. Their consent. 3. A lawful object; and, 4. Sufficient cause or consideration." 15 O.S. 1991 § 51 sets out the essentials of consent as follows: "The consent of the parties to a contract must be: 1. Free. 2. Mutual; and, 3. Communicated by each to the other." See also Restatement (Second) of Contracts § 17 (1979) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").
Although 15 O.S. 1991 § 2 provides that capacity and a lawful object are essential elements of a contract, they are omitted from Instruction No. 23.2, because ordinarily they will not be in dispute. 15 O.S. 1991 § 11 provides that all persons have the capacity to contract, except minors, mental incompetents, and prisoners.

Mutual consent is often, but not always, communicated through means of the exchange of an offer and acceptance. The requirement of an offer and acceptance was emphasized in National Outdoor Advertising Co. v. Kalkhurst, 418 P.2d 661, 664 (Okla. 1966), where the Oklahoma Supreme Court held: "It is an elementary rule of law in this jurisdiction that in order to constitute a contract there must be an offer on the part of one and an acceptance on the part of the other." See also Armstrong v. Guy H. James Const. Co., 402 P.2d 275, 277 (Okla. 1965) ("An offer becomes a binding promise and results in a contract only when it is accepted."); Horton Ins. Agency, Inc. v. Robinson, 824 P.2d 387, 400 (Okla. Ct. App. 1991) ("A valid and enforceable contract requires an offer, acceptance, and consideration.").

**Instruction No. 23.3**

**FORM OF CONTRACTS**

A contract may be written or oral.

A contract may be express or implied. An express contract is set out in words, either spoken or written. An implied contract is created by the acts or conduct of the parties. No particular form is required for words or conduct to create either an express or implied contract.

**Notes on Use**

The first paragraph should be used only when recovery is sought under an oral contract that is not covered by the Statute of Frauds, 15 O.S. 1991 § 136.

The second paragraph should be used only if a party is asserting that the agreement contains implied terms.
Comments

15 O.S. 1991 § 134 provides as follows for oral contracts: "All contracts may be oral, except such as are specially required by statute to be in writing."

The second paragraph is based on 15 O.S. 1991 §§ 131-133. Section 131 provides: "A contract is either express or implied." Section 132 defines an express contract as follows: "An express contract is one, the terms of which are stated in words." Section 133 defines an implied contract as follows: "An implied contract is one, the existence and terms of which are manifested by conduct."

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Instruction No. 23.4

**DEFINITION OF OFFER**

An offer is an expression that a person is willing to enter into a contract.

An offer must set out the terms of the proposed contract, it must be communicated to the other party by the party making the offer, and the party making the offer must intend to be obligated by its terms if accepted.

An offer remains open for the time stated in the offer or, if no time is stated, for a reasonable time.

An offer may set out the precise manner for acceptance or, if no manner is set out, it may be accepted in any reasonable manner.

An offer may be withdrawn at any time before it is accepted.

Once an offer has been rejected, it may no longer be accepted.

**Notes on Use**

The first and second paragraphs of this Instruction should be given whenever there is a dispute concerning the making of an enforceable offer. The third paragraph should be used only if there is a dispute over whether the time for accepting an offer has expired. The fourth paragraph should be used only if there is a dispute concerning
whether the acceptance was given in a proper manner. The fifth paragraph should be used only if there is a dispute over whether an offer has been withdrawn before acceptance. The last paragraph should be used only if there is a dispute concerning whether the offeree has rejected the offer but later attempts to accept it.

When there is no dispute concerning the validity of the offer, but there is a dispute concerning the validity of the acceptance, the judge should use only the first paragraph of this Instruction and should identify the offer for the jury.

Comments

The first two paragraphs of this Instruction are based on Restatement (Second) of Contracts § 24 (1979), which defines an offer as follows: "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." In Strahm v. Board of Trustees, 203 Okla. 635, 636, 225 P.2d 159, 161 (1950), the Oklahoma Supreme Court quoted the following definition from Pollock on Contract (8th ed.) with approval: "The expression of a person's willingness to become, according to the terms expressed, a party to an agreement, is called an offer or proposal." See also Farnsworth, Contracts 124 (1982) ("[An offer] can be defined as a manifestation of assent that is made by the offeror to the offeree in the form of a promise that is conditional on a manifestation of assent in the form of some action by the offeree and that confers upon the offeree the power to create a contract by taking that action.").

The third, fourth and fifth paragraphs of this Instruction are based on 15 O.S. 1991 §§ 68, 73. Section 73 provides:

A proposal is revoked:

1. By the communication of notice of revocation by the proposer to the other party, before his acceptance has been communicated to the former.

2. By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed the lapse of a reasonable time without communication of the acceptance.

3. By the failure of the acceptor to fulfill a condition precedent to acceptance; or,

4. By the death or insanity of the proposer.
Section 68 provides: "If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted."

The last paragraph is supported by the holding in Nabob Oil Co. v. Bay State Oil & Gas Co., 208 Okla. 296, 255 P.2d 513 (1953). The Syllabus by the Court states in pertinent part: "An offer is terminated by rejection and cannot thereafter be accepted so as to create a contract." 208 Okla. at 296, 255 P.2d at 514.

**Instruction No. 23.5**

**DEFINITION OF ACCEPTANCE**

An acceptance of an offer is a statement or conduct that shows that a person agrees to all the terms of the offer and intends to be bound by them.

In order to make a binding contract, an acceptance must be unconditional and agree to all material terms in the offer.

If new terms are proposed or some terms of the offer are rejected, the response to an offer is considered a rejection of the offer and a counteroffer, which must be accepted by the other party before a contract is formed.

An acceptance must be communicated to the person making the offer before the offer expires.

An acceptance must be communicated according to the terms specified in the offer, or if no terms are specified, in a reasonable manner.

**Notes on Use**

This Instruction should be given only if there is a dispute concerning the acceptance of an enforceable offer, and the first paragraph of this Instruction should be given whenever there is a dispute concerning the validity of an acceptance.
The second and third paragraphs are intended for contracts other than for the sale of goods. Where the contract is for the sale of goods and is governed by the Uniform Commercial Code, Instruction No. 23.6 should be given in their place. The second paragraph should be used if there is an issue whether the acceptance was unconditional. Both the second and third paragraphs should be used if the purported acceptance contained different terms from the offer and therefore constituted a counteroffer. The fourth paragraph should be used if there is an issue whether the acceptance was timely, and the fifth paragraph should be used if there is an issue whether the manner of acceptance was in conformity with the means specified in the offer.

Comments

15 O.S. 1991 § 71 provides: "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character, which the proposer can separate from the rest, and which will include the person accepting. A qualified acceptance is a new proposal." The Oklahoma Supreme Court explained what was required for an acceptance in *Armstrong v. Guy H. James Const. Co.*, 402 P.2d 275, 277 (Okla. 1965) as follows: "Ordinarily, to constitute acceptance of an offer, there must be an expression of the intention, by word, sign, writing or act, *communicated or delivered to the person making the offer or his agent.*" (emphasis in original). The requirement for an unconditional acceptance was emphasized in *Ollie v. Rainbolt*, 669 P.2d 275, 280-81 (Okla. 1983), where the Oklahoma Supreme Court said: "It is basic contract law that an acceptance will not bind the offeror unless it is unconditional, identical to the offer, and does not modify, delete or introduce any new terms into the offer." *But see Raydon Exploration, Inc. v. Ladd*, 902 F.2d 1496, 1500 (10th Cir. 1990) ("Immaterial variances between the offer and acceptance will be disregarded and the mere addition of collateral or immaterial matters will not prevent the formation of a contract.") (applying Oklahoma law).

15 O.S. 1991 § 68 requires the manner of acceptance to conform to any conditions stated in the offer, and 15 O.S. 1991 § 73 specifies the ways in which an offer may be revoked. These statutes are set out in the Comments to Instruction No. 23.4, *supra*. 
Instruction No. 23.6

**ACCEPTANCE (SALE OF GOODS)**

An expression by words or conduct within a reasonable time that clearly shows an intention to accept the offer is an acceptance even though it contains different or additional terms, unless the acceptance is expressly conditioned on the agreement to the different or additional terms.

**Notes on Use**

This Instruction should be used where the contract is for the sale of goods and is governed by the Uniform Commercial Code. It should be given only if there is a dispute concerning the acceptance of an enforceable offer. Instructions covering interpretation of the contract are found in Part Two of this Chapter.

**Comments**

12A O.S. 1991 § 2-207 has modified the common law rule that an acceptance must strictly conform to the terms of the offer has been modified for contracts for the sale of goods that are governed by the Uniform Commercial Code. Section 2-207 (1) provides: "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or express terms." Where the terms in the acceptance differ from those in the offer, the terms of the contract are to be determined in accordance with 12A O.S. 1991 § 2-207 (2), (3).
Instruction No. 23.7

**Acceptance Of Benefits**

A contract is formed when a person voluntarily accepts the benefit of an offer if [he/she] knew [or should have known] that the person making the offer intended to receive a specific benefit in return.

**Notes on Use**

This Instruction should be used in cases where there is evidence to support a contract implied in fact arising out of a party's actions and the surrounding circumstances rather than through an express statement of acceptance of an offer. This Instruction may also be used where it is claimed that a principal has accepted benefits obtained through an agent without any express acceptance by the principal; the acceptance of benefits can constitute a ratification of the contract made by the agent. **See also** Instruction No. 6.14.

**Comments**

This Instruction is based on 15 O.S. 1991 § 75, which provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known, or ought to be known to the person accepting." In *Wattie Wolfe Co. v. Superior Contractors, Inc.*, 417 P.2d 302, 308 (Okla. 1966), the Oklahoma Supreme Court held that a party's acceptance of the benefits of a transaction gave rise to an implied contract under this statute. The court said: "[W]e think that under this statute the conduct of the party accepting the benefits of a transaction, with knowledge, either actual or constructive, of all of the pertinent facts, coupled with the conduct of the other party, the benefits of which were so accepted, manifests the existence of a contract covering the transaction- an implied contract." **See also** Restatement (Second) of Contracts § 69 (1979).

15 O.S. 1991 § 75 may also be applicable in cases involving contracts made by agents. **See, e.g., City of Haileyville v. Smallwood**, 441 P.2d 388, 392 (Okla. 1968); *Edwards v. Petross*, 381 P.2d 1008, 1011 (Okla. 1963); *D.W.L., Inc. v. Coodner-Van Eng'g Co.*, 373 P.2d 38, 42 (Okla. 1962). In *D.W.L., Inc. v. Coodner-Van Eng’g Co.*, 373 P.2d 38, 42 (Okla. 1962), the Oklahoma Supreme Court held that a party's acceptance of
benefits from a transaction made by an unauthorized agent may constitute a ratification of the transaction. See also Crane Co. v. James McHugh Sons, Inc., 106 F.2d 55, 59 (10th Cir. 1939) (ratification by acceptance of benefits). Similarly, the Oklahoma Supreme Court held that it would be inequitable to allow a party to deny agency after receiving the benefits of a transaction in City of Haileyville v. Smallwood, 441 P.2d 388, 392 (Okla. 1968). See also Britton v. Mitchell, 361 F.2d 922, 926 (10th Cir. 1966) ("one may not accept the benefits of a contract or of an unauthorized agent's act and then repudiate the contract or the agency").

Instruction No. 23.8

**THE REQUIREMENT OF CONSIDERATION**

The law will enforce a promise only if the person to whom the promise was made gave something of value or promised to give something of value in exchange for the promise. This is the requirement of consideration.

If you find that [state what is claimed to be the consideration for the contract], then you should find that the requirement of consideration was satisfied, and you should go on and decide the other issues in the case. Otherwise, you must find that there was no contract.

**Notes on Use**

This Instruction should be given only if there is a dispute concerning the exchange of consideration that must be submitted to the jury. The trial judge should draft the Instruction according to the particular circumstances of the case. Who has the burden of proof on the issue of consideration will depend on whether the contract is written or oral.

For example, if there is an issue whether consideration is lacking on account of the contract being illusory, the second paragraph of the Instruction might be written as follows: "Consideration is missing from a contract if performance by one of the parties is purely optional. If you find that [the Promisor] had the option to cancel the agreement at
will so that [he/she] had no obligation at all to perform [his/her] promise, then there was no contract, because the requirement of consideration was not satisfied."

If there is an issue whether consideration is lacking because it is based on a pre-existing liability, the second paragraph of the Instruction might be written as follows: "A promise to do something that a person is already legally obligated to do is not sufficient to support a contract. If you find that [the Promisor] was already legally obligated to do the same thing that was promised in the agreement, then there was no contract, because the requirement of consideration was not satisfied."

If there is an issue whether consideration is inadequate because it was past consideration, the second paragraph of the Instruction might be written as follows: "Consideration that has been given in the past is not sufficient to support a contract. If you find that what was promised in the agreement had already been performed when the agreement was made, then there was no contract, because the requirement of consideration was not satisfied."

**Comments**

The definition of consideration is given in 15 O.S. 1991 § 106 as follows:

Any benefit conferred, or agreed to be conferred upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.

Although 15 O.S. 1991 § 2 lists consideration as an essential element for a contract, consideration is presumed for written contracts. 15 O.S. 1991 § 114 ("A written instrument is presumptive evidence of consideration."). As a consequence, the party seeking to invalidate a written contract has the burden of proving absence of consideration. 15 O.S. 1991 § 115("The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.").

The Oklahoma Court of Appeals noted in *Wilson v. Gifford-Hill & Co., Inc.*, 570 P.2d 624 (Okla. Ct. App. 1977), that an agreement may become illusory if one party retains the option to cancel the agreement. The Court of Appeals explained: "The text writers have generally viewed the cases as adopting the rule that the reservation of a unilateral right to cancel the entire agreement is so broad as to negate the existence of any consideration in that the promise is essentially empty or illusory. But where notice of
cancellation is required the promisor is bound sufficiently so that his promise to buy or give notice of cancellation meets the requirement of consideration." 570 P.2d at 626.

The existence of a pre-existing duty was held to negate consideration in *Watson v. American Creosote Works, Inc.*, 184 Okla. 13, 84 P.2d 431 (1938). In affirming an order striking the defendant's counterclaim, the Oklahoma Supreme Court held that "an agreement on the part of the plaintiff to do that which he was already obligated to do . . . did not constitute a sufficient consideration for a new promise." 184 Okla. at 16, 84 P.2d at 434. Similarly, in *Powers Restaurants, Inc. v. Garrison*, 465 P.2d 761, 763 held that the relinquishment of an invalid claim did not provide consideration for a contract.

In *Johnson v. Hazalez*, 338 P.2d 345 (Okla. 1959), the Oklahoma Supreme Court observed that past consideration was not adequate to support a contract. The Oklahoma Supreme Court stated: "A past consideration, if it imposed no legal obligation at the time it was furnished, will not support a promise. [Citations omitted.]. However, a contract founded partly on past consideration and partly on future consideration, such as continued care and assistance is enforceable." 338 P.2d at 347.

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**Instruction No. 23.9**

**MODIFICATION OF CONTRACTS**

The parties to a contract can agree to modify a contract by changing one or more of its terms while continuing to be bound by the rest of the contract.

Whether the contract was modified by the parties depends on their intent as shown by their words, whether written or oral, or their conduct. No particular form is required to modify a contract.

**OR**

A modification of a written contract must also be in writing, unless it is shown by clear and convincing evidence that the written contract has been modified by an oral agreement which the party seeking to enforce has already fully performed.
Notes on Use

This Instruction should be used if there is a jury question concerning modification of a contract. The trial judge should select between the second and third paragraphs above. The second paragraph should be given if the original contract was oral, and the third paragraph should be given if it was in writing.

Comments

The modification of contracts is governed by 15 O.S. 1991 §§ 236, 237. 15 O.S. 1991 § 236 provides: "A contract not in writing may be altered in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the new alteration." 15 O.S. 1991 § 237 provides: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." The Oklahoma Supreme Court stated in Dewberry v. Universal C.I.T. Credit Corp., 415 P.2d 978, 979 (Okla. 1966), that "the subsequent `executed oral agreement' referred to in § 237, supra, must be established by `positive, clear and convincing proof.' See also Creekmore v. Redman Indus., Inc., 671 P.2d 73, 79 (Okla. Ct. App. 1983) ("an `executed oral agreement' must be established by positive, clear and convincing evidence").

Instruction No. 23.10

QUASI-CONTRACT (QUANTUM MERUIT OR QUANTUM VALEBANT)

You may determine that [Defendant] is liable to [Plaintiff] for [describe the goods or services that the plaintiff provided to the defendant], if you find that:

1. [Plaintiff] [furnished/rendered] valuable [goods/services] to [Defendant] with a reasonable expectation of being compensated;

2. [Defendant] knowingly accepted the benefit of the [goods/services]; and

3. [Defendant] would be unfairly benefited by [(the services)/(receiving the goods)] if no compensation were paid to [Plaintiff].
If you find all of these elements are satisfied, then you should return a verdict for [Plaintiff] in an amount that reasonably represents the fair value of the [goods/services] that [Plaintiff] [furnished/rendered] to [Defendant].

Notes on Use

This Instruction applies to cases where recovery of the reasonable value of goods or services is sought under a quasi-contract theory. For an Instruction for implied in fact contracts, see Instruction No. 23.7.

Comments

In appropriate cases, a party may have an obligation under a quasi-contract where there is no actual contract, either express or implied. The Oklahoma Supreme Court described the distinction between a contract and a quasi-contract in *T & S Inv. Co. v. Coury*, 1979 OK 53, 593 P.2d 503, as follows:

A "quasi" or constructive contract is an implication of law. An "implied" contract is an implication of fact. In the former the contract is a mere fiction, imposed in order to adapt the case to a given remedy. In the latter, the contract is a fact legitimately inferred. In one the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty.


The Oklahoma Supreme Court emphasized unjust enrichment as the basis of recovery in quasi-contract in *Conkling's Estate v. Champlin*, 1943 OK 282, 141 P.2d 569, 193 Okla. 571. It explained:

The relations are remedial in assumpsit and hence contracts arising from facts and circumstances independent of agreement or presumed intention; whereas in express and implied contracts the intention of the parties is the essence of the transaction. The duty is not infrequently found on the doctrine of unjust enrichment.

1943 OK 282, ¶ 4, 141 P.2d at 570, 193 at Okla. 80. A claim for unjust enrichment is generally equitable, and therefore, a jury instruction is not needed for most unjust enrichment claims. *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 18, 164 P.3d 1028, 1035 ("Where the plaintiff has an adequate remedy at law, the court will
not ordinarily exercise its equitable jurisdiction to grant relief for unjust enrichment."); *Waggoner v. Johnston*, 1965 OK 192, ¶ 10, 408 P.2d 761, 766 ("[I]n an equitable action, trial by jury is not a matter of right."); *N.C. Corff Partnership, Ltd. v. OXY USA, Inc.*, 1996 OK CIV APP 92, ¶ 25, 929 P.2d 288, 295 ("A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another."). However, an action on a common count, such as for money had and received or quasi-contract, is an action at law that is triable to a jury. *Sarber v. Harris*, 1962 OK 4, ¶ 5, 368 P.2d 93, 95; *Sholer v. State x rel. Dep't Public Safety*, 1997 OK 89 n.4, 945 P.2d 469, 479 n.4

In *Welling v. American Roofing & Sheet Metal Co., Inc.*, 1980 OK 131, 617 P.2d 206, the Oklahoma Supreme Court adopted the following measure of damages for quasi-contract cases:

The measure of damages in a quasi-contract action is the amount which will compensate the party aggrieved for the detriment proximately caused thereby, and, if the obligation is to pay money, the detriment caused by the breach in the amount due by the terms of the obligation.


(2009 Supp.)

**PART TWO --- INTERPRETATION**
**Instruction No. 23.11**

**INTERPRETATION OF CONTRACTS --- IN GENERAL**

In this case, you will need to decide the meaning of the following term of the contract: [quote the term whose meaning is in dispute to the jury]. To do this you must decide what the intent of the parties was when they made their contract.

To decide what their intent was you should first examine the language of the contract. You may also consider the circumstances under which the parties made the contract, and what the parties themselves believed the term meant as shown by the evidence.

A contract should be interpreted so that it is [lawful,] reasonable and capable of being carried out, if this can be done without changing the intention of the parties.

**Notes on Use**

This Instruction should not be given unless there is a jury question as to the contract's meaning. In order to focus the jury's attention on the language whose meaning is in dispute, the trial court should quote the language from the contract in the first sentence. The bracketed word "lawful" should not be included, unless one party urges an interpretation of the contract that would make it unlawful. If it is included, the court should also instruct the jury on which interpretation is unlawful.

**Comments**

The interpretation of a contract should not be presented to the jury unless the court determines that the contractual language is ambiguous. See Corbett v. Combined Communications Corp. of Okla., Inc., 654 P.2d 616, 617 (Okla. 1982) ("If the language of a contract is clear and without ambiguity, the Court is to interpret it as a matter of law. [Citation omitted.]. Similarly, the existence of an ambiguity is a decision to be made by the Court."); Walker v. Telex Corp., 583 P.2d 482, 485 (Okla. 1978) ("The construction
of an unambiguous contract is a matter of law for the court. [Citation omitted.]. If an ambiguity arises by reason of the language used and not because of extrinsic facts, construction of the contract remains a question of law for the court.

The second sentence of the first paragraph is derived from 15 O.S. 1991 § 152, which provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful."

The first sentence of the second paragraph is based on 15 O.S. 1991 § 154, which provides: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." See also Mercury Inv. Co. v. F.W. Woolworth Co., 706 P.2d 523, 529 (Okla. 1985) ("[W]here a contract is complete in itself and, as viewed in its entirety, is unambiguous, its language is the only legitimate evidence of what the parties intended.") (emphasis in original). Although interpretation is not a jury question if a contract's language is unambiguous, this first sentence is included in the Instruction in order to make plain to the jury that the language of the contract is the primary determinant of its meaning. Besides the language the jury should also consider the surrounding circumstances and the actions of the parties. See 15 O.S. 1991 § 163 ("A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."); Farmer v. Trepp, 376 P.2d 596, 598 (Okla. 1962) ("It is settled law in this jurisdiction that the practical construction placed upon an ambiguous agreement by interested parties will be given great if not controlling weight."); Gillham v. Jenkins, 244 P.2d 291, 294 (Okla. 1952) ("In the interpretation of a contract the mutual intention of the parties as it existed at the time of the contract is a paramount objective. The circumstances under which the contract was made and the subsequent acts and conduct of the parties may be considered in arriving at the intention.").

The last paragraph is based on 15 O.S. 1991 § 159, which provides: "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."
Instruction No. 23.12

Entire Contract

A contract is to be interpreted as a whole, and the overall intention of the parties is controlling over the separate parts of a contract.

If possible, each part of a contract must be used to help interpret the other parts, but if one part is wholly inconsistent with the general intention of the parties, it should be rejected.

When a contract is partly printed and partly typed [hand-written], then the typed [hand-written] part is controlling over the printed part should there be any inconsistencies between these parts.

Where several contracts make up a single transaction, then they should be interpreted together.

Notes on Use

Ordinarily, only some of these paragraphs would be needed in a particular case. The first two paragraphs of this Instruction should be given where the problem of interpretation involves the interrelationship of various provisions of a contract. The third paragraph would be appropriate to resolve a conflict between printed and typed (or hand-written) provisions in a contract. The last paragraph should be given if the case concerns a contract that was one of several involved in a single transaction.

Comments

The first two paragraphs are a combination of the rules of interpretation found in 15 O.S. 1991 §§ 157, 165, 168, 169. Section 157 provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others." Section 165 provides: "Particular clauses of a contract are subordinate to its general intent." Section 168 provides: "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause, subordinate to the general intent and purposes of the whole contract."
And Section 169 provides: "Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected."

The third paragraph is derived from 15 O.S. 1991 § 167, which provides:

Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and particular contract in question the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded.

The last paragraph is taken from 15 O.S. 1991 § 158, which provides: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

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**Instruction No. 23.13**

**MEANING OF WORDS**

You should interpret the words of the contract in their ordinary and popular sense, unless you decide that the parties used them in some other sense.

If the parties used technical words, they should be interpreted in the way that they are usually understood by persons in the business in which they are used, unless clearly used in a different sense.

If the parties to the contract have dealt with each other before and their previous dealings showed that they had a common understanding as to the meaning of certain terms, then you should interpret those terms according to their commonly understood meaning.
Notes on Use

The first paragraph of this Instruction will ordinarily be appropriate whenever there is an issue concerning the interpretation of a contract. The second paragraph would be needed if the contract used technical terms, and the third paragraph would be needed if the contract's meaning was affected by a prior course of dealing between the parties. Where there is no issue as to the meaning of terms whose definitions are important for the jury to make a determination, the court should give a separate instruction defining those terms.

Comments

The first paragraph is based on 15 O.S. 1991 §§ 160, 161. Section 160 provides: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." The third paragraph covers the "special meaning ... given ... by usage" in §160. Section 161 provides as follows for the interpretation of technical terms: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

Instruction No. 23.14

CONSTRUCTION IN FAVOR OF PROMISSEE

If the terms of a promise are uncertain, then you should interpret those terms the way that the person making the promise believed the other person understood them when the promise was made.

Notes on Use

This Instruction will ordinarily be needed whenever there is a jury question concerning the interpretation of a contract.

Comments

This Instruction is based on 15 O.S. 1991 § 165. Section 165 provides: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the
sense in which the promisor believed, at the time of making it, that the promisee understood it."

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**Instruction 23.15**

**IMPLICATION OF TERMS**

Any terms that are necessary to carry out the intention of the parties and make the contract effective may be implied unless the contract provides otherwise.

**Notes on Use**

This Instruction would be needed in a case where there was a jury question whether some terms of the contract should be implied. The trial court should be aware that in addition to occasions where implication is expressly prohibited, implication may be prohibited under the doctrine set forth at the end of 15 O.S. 1991 § 172, which sometimes goes by the Latin expression of *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another). It is conceivable that there could be a jury question as to whether implication would be prohibited because other things of the same class were mentioned in the contract; in such a case, this Instruction would have to be modified so that the jury could decide the question.

**Comments**

This Instruction is derived from 15 O.S. 1991 § 172, which provides: "All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded."
Instruction No. 23.15A

**WORKMANLIKE MANNER**

By agreeing to perform work in a contract, a person promises to use reasonable skill, care, and diligence and that the work will be done in a workmanlike manner and be reasonably fit for its intended use.

**Notes on Use**

This is one example of a term that is commonly implied in contracts for services, and it is appropriate for most cases where there is a jury question concerning the adequacy of performance of services under a contract.

**Comments**

In *Keel v. Titan Constr. Corp.*, 639 P.2d 1228, 1231 (Okla. 1981), the Oklahoma Supreme Court set out the implied duty to perform in a workmanlike manner as follows:

As a general rule, there is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner. With respect to the skill required of a person who is to render services, it is a well-settled rule that the standard of comparison or test of efficiency is that degree of skill, efficiency, and knowledge which is possessed by those of ordinary skill, competency, and standing in the particular trade or business for which he is employed, or as we said in *Cox v. Curnutt*, [271 P.2d 342, 345 (Okla. 1954)], "such care and skill as a reasonably competent and skillful person should have exercised in the performance of his contractual obligation."
Instruction No. 23.16

CONSTRUCTION AGAINST DRAFTER

If you cannot decide the intention of the parties after considering Instruction Nos. ___ to ___, then you should interpret the unclear terms in the contract most strongly against the party responsible for the uncertainty.

Notes on Use

The trial court ordinarily should give this Instruction in a case where the interpretation of a contract is a jury question.

Comments

15 O.S.1991 § 170 provides: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

PART THREE --- BREACH
Instruction No. 23.21

**Breach of Contract**

A contract is breached or broken when a party does not do what [he/she/it] promised to do in the contract.

**Notes on Use**

This Instruction introduces the other Instructions dealing with breach, and it should be given when there is a jury question concerning whether a breach of contract has occurred.

**Comments**

Restatement (Second) of Contracts § 235 (1979) provides as follows: "(1) Full performance of a duty under a contract discharges the duty. (2) When performance of a duty under a contract is due any non-performance is a breach."

Instruction No. 23.22

**Performance of Conditions Precedent**

A contract may provide that the duty of one party to perform does not arise until after the performance of some act or the happening of some event. This is known as a condition precedent.

To decide whether or not [state the terms of the disputed condition] is a condition precedent to the [Defendant]'s duty to perform, you must decide what the parties intended. To do so you may consider the language of the contract, the circumstances
under which the parties made the contract, and what the parties themselves believed as shown by the evidence.

**Notes on Use**

This Instruction should be used when there is a jury question concerning a condition precedent to a party's performance. If the question is whether the condition did in fact occur, the court should give the first paragraph along with a charging instruction with respect to that factual question. The second paragraph is intended for cases where the jury is called upon to determine whether a term in a contract is a condition precedent to a party's performance.

**Comments**

A party's performance under a contract is ordinarily conditioned on a number of terms that must be satisfied or events that must occur before the performance is due. For example, in *McDaniel v. McCauley*, 371 P.2d 486 (Okla. 1962), the Oklahoma Supreme Court held that a broker was not entitled to a real estate commission because the sale on which the commission was based was not concluded. A number of Oklahoma courts have quoted with approval the following definition of a condition precedent from *Northwestern Nat'l Life Ins. Co. v. Ward*, 56 Okla. 188, 192, 155 P. 524, 526 (1916): "A condition precedent of a contract is one which calls for the performance of some act or the happening of some event after the contract is entered into and upon the performance or happening of which its obligations are made to depend."

By relieving a promisor of the obligation to perform, the enforcement of a condition may result in a forfeiture to the promisee who may have relied on the anticipated performance of the promisor. Accordingly, there is a rule of interpretation against the existence of conditions precedent unless they are provided for expressly. See *McAtee v. Wes-Lee Corp.*, 566 P.2d 442, 444 n.1 (Okla. 1977) ("Courts are disinclined to construe contract stipulations as conditions precedent unless compelled by the plain language of the contract.").
Instruction No. 23.23

**SUBSTANTIAL PERFORMANCE**

A party is not required to perform each and every term of a contract completely and exactly in order to recover for its breach. A party who has substantially performed a contract is entitled to recover.

[Plaintiff]'s performance is substantial if [he/she/it] proves all of the following:

1. [Defendant] received substantially what the contract required;
2. Any omissions, deviations or defects can be corrected without difficulty; and
2. [Plaintiff] acted in good faith in intending to perform [his/her/its] part of the contract.

**Notes on Use**

Although this Instruction is intended to be used primarily in connection with construction contracts, it may also be appropriate in other cases where, despite some minor deficiencies, there has been substantial performance by the party seeking recovery under the contract. This Instruction should be given together with Instruction No. 23.56, which covers offsets for minor deficiencies if substantial performance is found, and the remedy in quantum meruit if no substantial performance is found.

**Comments**

Under the doctrine of substantial performance a party is allowed to recover under a contract even though the contract may not have been performed exactly as promised. In affirming a judgment based on a finding of substantial compliance with a construction contract, in *Collins v. Baldwin*, 405 P.2d 74, 81 (Okla. 1965), the Oklahoma Supreme Court quoted the following language from *Kizziar v. Dollar*, 268 F.2d 914, 916 (10th Cir.), *cert. denied*, 361 U.S. 914 (1959), with approval:

There is substantial performance when the builder has in good faith intended to perform his part of the contract and has done so in the sense that the building is substantially what is provided for, and there are no omissions or deviations from the general plan which cannot be remedied without difficulty.
**Instruction No. 23.24**

**EXCUSE OF CONDITION**

Even though a contract may call for a condition to be satisfied before a party's performance is required, in some cases the condition may be excused so that the party's performance is required even though the condition has not been satisfied. In this case, [Plaintiff] claims that the condition in the contract that [state the terms of the condition that is in issue] was excused because [state the basis of the excuse].

**Notes on Use**

This Instruction should be used if there is a jury question concerning excuse of condition.

**Comments**

Possible grounds for excuse of a condition include waiver, that the failure of the condition was caused by the party from whom recovery is sought, and the need to avoid a forfeiture.

An example of the excuse of a condition on account of waiver is found in *E. V. Cox Constr. Co. v. Brookline Assocs.*, 604 P.2d 867, 871 (Okla. Ct. App. 1979). Although the contractor failed to complete a construction project until seven months after the deadline specified in the contract, it nevertheless was allowed to recover because the owner had waived timely performance by failing to complain about the delay and continuing to make progress payments after the deadline passed. See also *Oklahoma State Fair Exposition v. Lippert Bros., Inc.*, 243 F.2d 290, 292 (10th Cir. 1957) (waiver of breach by acquiescence in continued performance).

In some cases a party's own breach may prevent the occurrence of a condition and thus provide an excuse for the condition. See Restatement (Second) of Contracts § 245 (1979) ("Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused."). For example, in *Sunray DX Oil Co. v. Great Lakes Carbon Corp.*, 467 P.2d 329, 344-45 (Okla. 1970), a buyer sought damages for breach of a contract to deliver goods, and the seller argued that the buyer was in default for failure to pay for the goods. The Oklahoma Supreme Court found that the reason the buyer refused to pay for the goods was that they
did not satisfy the contract's specifications, and it therefore held that the buyer's default was excused by the seller's breach of the contract. See also King v. Board of Regents, Claremore Junior College, 541 P.2d 836, 841 (Okla. 1975) ("When one party to a contract acts in a manner which prevents performance by the adverse party, such party waives his right to require the adverse party to perform."); Seal v. Carroll, 439 P.2d 185, 189 (Okla. 1968) ("[A] party to a contract may not prevent performance of a condition therein and then claim the benefit of such condition."); Hooper v. Commercial Lumber Co., 341 P.2d 596, 598 (Okla. 1959) ("[O]ne party will not be permitted by his breach to create a condition which will tend to bring the other party in default and then assert that such party's rights are forfeited by a default so caused.").

Restatement (Second) of Contracts § 229 (1979) provides as follows for the excuse of a condition to avoid a forfeiture: "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."

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Instruction No. 23.25A

**Performance To Satisfaction Of Other Party**

Under the contract in this case, [Plaintiff] was required to perform to [Defendant]'s satisfaction. Whether this means that [Defendant] must actually have been satisfied with [Plaintiff]'s performance or merely that [Defendant] should reasonably have been satisfied with [Plaintiff]'s performance depends on the intention of the parties. In determining the intention of the parties, you may consider the language of the contract, the circumstances under which the parties made the contract, and what the parties themselves believed as shown by the evidence. If you are uncertain, then you should decide that [Plaintiff]'s performance was sufficient if [Defendant] should reasonably have been satisfied with it. Even if you decide that the contract required [Defendant]'s actual satisfaction with [Plaintiff]'s performance, [Defendant] is required to act in good faith and
may not claim to be dissatisfied simply to avoid [his/her/its] obligations under the contract.

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**Instruction No. 23.25B**

**PERFORMANCE TO SATISFACTION OF THIRD PARTY**

Under the contract in this case, [Plaintiff] was required to perform to the satisfaction of [Name of Third Party]. Whether this means that the determination of [Name of Third Party] was to be absolutely binding on the parties depends on their intention. In determining the intention of the parties, you may consider the language of the contract, the circumstances under which the parties made the contract, and what the parties themselves believed as shown by the evidence. Even if you decide that the parties intended the determination of [Name of Third Party] was to be absolutely binding on them, [Name of Third Party] must exercise honest judgment, and [his/her/its] determination will not be binding if there is fraud or such a gross mistake that would indicate bad faith.

**Notes on Use**

These Instructions should be given in cases in which the contract at issue requires that a party must perform to the satisfaction of either the other party or a third party respectively, and there is a jury question concerning whether that condition has been satisfied.

Instruction No. 23.25A has been drafted for cases where the contract requires a party's performance to the satisfaction of the other party, and there is a jury question whether satisfaction is determined by a subjective or objective standard. In cases where there is no jury question as to whether satisfaction should be measured by a subjective or objective standard, the paragraph should be shortened by deleting the second through fourth sentences and redrafting the fifth sentence to reflect whichever standard was intended.
Instruction No. 23.25B has been drafted for cases where the contract requires a party's performance to the satisfaction of a third party, such as an architect or engineer, and there is a jury question whether the third party's determination was to be absolutely binding on the parties. In cases where there is no jury question as to whether the third party's determination was to be absolutely binding, the paragraph should be shortened by deleting the second and third sentences and redrafting the fourth sentence by replacing the words "if you decide that" with "though."

Comments

Restatement (Second) of Contracts § 228 (1979) provides the following rule of interpretation for contracts containing a condition of performance to the satisfaction of the other party:

When it is a condition of an obligor's duty that he be satisfied with respect to the obligee's performance or with respect to something else, and it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an interpretation is preferred under which the condition occurs if such a reasonable person in the position of the obligor would be satisfied.

Instruction No. 23.25B, involving performance to the satisfaction of a third party, is based on the following statement in *Cook v. Oklahoma Bd. of Pub. Affairs*, 736 P.2d 140, 151 (Okla. 1987):

Oklahoma follows the rule that, where parties to a construction contract designate a person—such as an architect or project engineer—to determine questions about its execution, the parties are bound by such determination except in the case of fraud or gross mistake on the part of the engineer as would necessarily imply bad faith or a failure on his part to exercise honest judgment.

*See also Antrim Lumber Co. v. Bowline*, 460 P.2d 914, 921-22 (Okla. 1960) (determination of third party may be impeached by showing of fraud, either actual or constructive); *Lippert Bros. v. City of Atoka*, 94 F. Supp. 630, 632 (E.D. Okla. 1950) ("If parties to a construction contract designate an engineer as arbiter of amount and character of work done and amount due contractor, engineer's approval is binding on the parties, but may be avoided upon showing of actual fraud or gross mistake constituting constructive fraud."). *See generally* E. Allan Farnsworth, Contracts 556-60 (2d ed. 1984) (discussing conditions involving a party's performance to the satisfaction of the other party or a third party).
Instruction No. 23.26

TENDER OF PERFORMANCE

When a contract requires both parties to perform at the same time, the party seeking to enforce the contract must show that [he/she/it] made a tender of performance. A tender of performance is an offer by a party to perform a contract according to its terms without imposing any additional conditions. Also, the party making a tender of performance must be ready and able to perform.

A party is excused from making an offer to perform if [state the applicable grounds for excuse].

Notes on Use

This Instruction should be given in a case involving concurrent conditions where there is a jury question concerning the making of a tender of performance by the party seeking to enforce the contract.

The second paragraph should be given in a case where no tender was made, and the party seeking to enforce the contract claims that tender was excused, because the other party has repudiated the contract, tender would be useless, or for other reasons.

If the trial court determines that it would assist the jury in understanding the concept of tender, it might give the following paragraph in its Instruction:

For example, in a case involving a contract for the sale of goods, if the seller sues for breach of the contract, the seller must show that it offered to and was ready to deliver the goods; and if the buyer sues for breach of the contract, the buyer must show that it offered to and was ready to pay the agreed price.

Comments

Restatement (Second) of Contracts § 238 (1979) provides as follows for tender of performance:

Where all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a condition of each party's duties to render
such performance that the other party either render or, with manifested present ability to do so, offer performance of his part of the simultaneous exchange.

With respect to contracts for the sale of goods, 12A O.S. 1991 § 2-506 provides in part: "Tender of delivery is a condition to the buyer's duty to accept the goods, and, unless otherwise agreed, to his duty to pay for them."; likewise, 12A O.S. 1991 § 2-511 provides in part: "Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery."

Tender is excused if there has been a repudiation by the other party, or there is other reason to expect that tender would be useless. The Oklahoma Supreme Court explained this point in Puls v. Casey, 18 Okla. 142, 145-46, 92 P. 388, 389 (1907), as follows:

Ordinarily, where a tender is pleaded, and is a condition precedent to a right of recovery, an actual tender and offer to pay the sum due unconditionally is required. But where the proof shows that the party pleading the tender had the money present, ready to make the payment, and so informed the other party, and the creditor informed him that he would not accept it, the formality of a technical tender is made unnecessary.

See also Young v. Blackert, 51 Okla. 285, 293, 151 P. 1057, 1059 (1915) ("[W]hen the tender of performance of an act is necessary to the establishment of any right against another party, such tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused."); Hidalgo Properties, Inc. v. Wachovia Mortgage Co., 617 F.2d 196, 199 (10th Cir. 1980) ("A party is excused from tendering performance of conditions precedent when the other party repudiates the contract."). But see Bushey v. Dale, 181 Okla. 481, 484, 75 P.2d 193, 196 (1937), where the Oklahoma Supreme Court required an absolute refusal to excuse tender. The Supreme Court held:

[M]ere expressions of dissatisfaction with the contract, or of a desire to rescind it, or of reluctance to perform it, or of intention to refuse to perform, in the absence of absolute refusal itself, are all insufficient to constitute a breach of the contract so as to relieve the opposite party from tendering performance on his part.
Instruction No. 23.27

DIVISIBLE CONTRACT

If a contract is divisible, a party may recover under the contract after performing only part of it. On the other hand, if the contract is not divisible, a party who performs only part of it may not recover according to the terms of the contract, but that party may recover to the extent that the other party received a benefit from the partial performance. Whether the contract in this case was divisible depends on the intention of the parties. In determining the intention of the parties, you may consider the language of the contract, the circumstances under which the parties made the contract, and what the parties themselves believed as shown by the evidence.

Notes on Use

This Instruction should be used in cases where there is a jury question about whether a contract is divisible. In cases where there is no jury question as to whether the contract is divisible, it should be shortened by deleting the last two sentences. If the court determines that the contract is divisible, the jury should receive the first sentence, but if the court determines that the contract is not divisible, the court should give the jury a modified version of the second sentence in which the words "on the other hand, if the contract is not divisible" are deleted.

Comments

The Oklahoma Supreme Court summarized the law concerning divisibility of contracts in Holden v. Davis, 665 P.2d 1175, 1177 (Okla. 1983), as follows:

Whether a contract is entire or divisible must be determined by whether the parties agreed to their mutual promises as a single, indivisible whole such that the bargain which they struck could only be achieved by fulfillment of the entire contract. "A contract is entire when its terms, nature, and purposes show that it is contemplated and intended that each and all of its parts, material provisions, and consideration are common each to the other and interdependent." Snyder v. Noss, 9 Okla. 142, 226 P. 319 (1924). In contrast, a severable or divisible contract is one whose performance is divided into different, differentiated and distinct groups.
wherein each separate performance forms the agreed exchange for that portion of the contract."

See also Sunrizon Homes, Inc. v. American Guar. Inv. Corp., 782 P.2d 103, 107 (Okla. 1988) ("Generally, contracts are either valid or void in their entirety, and cannot be partially rescinded. . . . A contract may be severable if the parties to a single contract intend performance under the contract to be divisible rather than entire.").

Even if a contract is not divisible, some recovery may be allowed for partial performance on a quantum meruit basis. This point was the basis of the decision in Burke v. McKee, 304 P.2d 307, 307 (Okla. 1956), where the Syllabus by the Court states:

1. A party who has performed only a part of his side of a contract is not in all cases without a remedy, for, if the other party has derived a benefit from the part performed which it would be unjust to allow him to retain without paying anything therefor, the law generally implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth and allows recovery of that quantum of remuneration.

Instruction No. 23.28

ANTICIPATORY REPUDIATION

A contract is breached or broken, even if the time for performance has not arrived, when one party notifies the other [acts in such a way that it is clear] that [he/she/it] does not intend to do what was promised in the contract. [However, it is not a breach of a contract if a party merely complains about the contract or expresses doubt about whether to do what was promised in it.]

Notes on Use

This Instruction should be used in place of Instruction 23.21, where the promisee offers evidence of the promisor's anticipatory repudiation before the promisor's performance was due. The bracketed language "act in such a way that it is clear" should be substituted for "notifies the other" if the alleged repudiation was by conduct, rather than by words. The last sentence should be given if there is a jury question whether the
repudiation was sufficiently unequivocal to constitute a breach. This Instruction should be modified if the anticipatory repudiation is based on the promisor's failure to give adequate assurance of performance. See Restatement (Second) of Contracts § 251 (1979).

**Comments**

Under the doctrine of anticipatory repudiation, a party's repudiation of a contract before the party's performance is due gives the other party an immediate action for breach of the contract and excuses the other party from satisfying any conditions precedent to the breaching party's performance. For contracts for the sale of goods, 12A O.S. 1991 § 2-614 provides:

> When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

In *Bushey v. Dale*, 181 Okla. 481, 484, 75 P.2d 193, 196 (1937), the Oklahoma Supreme Court described the doctrine of anticipatory repudiation as follows:

It is a well-established rule that the declaration on the part of one party to a bilateral, executory contract, of his intention not to perform it, thus making the other party's tender of performance futile, relieves the latter of the necessity of making the idle gesture of a formal tender. [Citations omitted.] However, it is equally well settled that such refusal must be distinct, unequivocal, and absolute in terms and treated and acted upon as such by the other party. [Citations omitted.] Under the decisions cited, mere expressions of dissatisfaction with the contract, or of a desire to rescind it, or of intention to refuse to perform, in the absence of absolute refusal itself, are all insufficient to constitute a breach of the
contract so as to relieve the opposite party from tendering performance on his part.

See also Eke Builders, Inc. v. Quail Bluff Assocs., 714 P.2d 604, 608 (Okla. Ct. App. 1985) ([The [Defendant]'s declarations and actions amounted to a repudiation of the contract justifying plaintiff to treat the contract as totally breached and to immediately sue for damages.''); Hidalgo Properties, Inc. v. Wachovia Mortgage Co., 617 F.2d 196, 199 (10th Cir. 1980) ("A party is excused from tendering performance of conditions precedent when the other party repudiates the contract."); Bu-Vi-Bar Petroleum Corp. v. Krow, 40 F.2d 488, 491 (10th Cir. 1930) ("When one party to a contract gives notice to the other party, before the latter is in default, that he will not perform such contract on his part and does not retract such notice before performance on his part is due, such other party is entitled to enforce the contract without previously performing or offering to perform the provisions of the contract upon his part in favor of the former party.").

Restatement (Second) of Contracts § 250 (1979) defines a repudiation as follows:

A repudiation is

(a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach under § 243, or

(b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.

In some circumstances a promisor's failure to provide adequate assurance of performance may constitute a repudiation. See Restatement (Second) of Contracts § 251 (1979), which provides:

(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

(2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.
PART FOUR --- DEFENSES

Instruction No. 23.31

LACK OF CAPACITY

Lack of capacity at the time a contract is made relieves a party of the duty to perform the contract. A person lacks capacity if [he/she] is unable to understand the nature of the contract and the consequences of [his/her] agreement. In this case, [Defendant] must prove by clear and convincing evidence that [he/she] lacked capacity due to [state grounds for lack of capacity]. This means you must be persuaded, considering all the evidence in the case, that it is highly probable and free from serious doubt that [he/she] lacked capacity.

Notes on Use

Grounds for lack of capacity include mental illness, mental incompetence, and intoxication. Another ground for lack of capacity is that the party is under 18 years old, but this would present a jury question only in unusual circumstances. Other grounds for lack of capacity are discussed in the Comments below.

Comments

A number of statutes dealing with the capacity to contract are found at 15 O.S. 2001 §§ 11-34. Section 11 provides that "all persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights," except that with the approval of the Director of the Department of Corrections, prisoners may make employment contracts. Minors are defined as persons under 18 years of age in Section 13. Section 18 provides that minors may make contracts that do not relate to real property, but under Section 19, a minor's contracts (other than contracts for necessaries and those involving motor vehicles) are subject to disaffirmance until one year after the minor reaches majority. Section 22 provides that a person who is "entirely without understanding" is without power to make a contract, but such a person is liable for...

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1 Some or all of these defenses may also be used as an affirmative remedy for rescission under appropriate circumstances.
necessaries. Section 23 provides that the contract of a person who is of "unsound mind, but not entirely without understanding" is subject to rescission, if it was made before the person's incapacity has been judicially determined. Lack of capacity to contract can arise from intoxication. *Coody v. Coody*, 1913 OK 649, ¶ 1, 136 P. 754, 755, 39 Okla. 719, 722, ("Intoxication which is absolute and complete, so that the party is for the time entirely deprived of the use of his reason and is wholly unable to comprehend the nature of the transaction and of his own acts, is a sufficient ground for setting aside or granting other appropriate affirmative relief against a conveyance or contract made while in that condition, even in the absence of fraud, procurement, or undue advantage by the other party."). Another statute dealing with capacity is 30 L.S. 2001, § 1-111(12). There is a presumption in favor of a person's capacity to contract, which requires clear and convincing evidence to overcome. See *Cushing v. McWaters*, 1918 OK 608, ¶ 3, 175 P. 838, 839, 71 Okla. 138, 138, ("[W]here a party enters into a contract, the presumption is in favor of his or her capacity to contract."); *Sooner Fed. Sav. & Loan Ass'n v. Smoot*, 1987 OK 7, ¶ 11, 735 P.2d 555, 558 ("The evidence presented to establish [the grantor's] incompetence must itself be of a clear and convincing nature to overcome the presumption of competence.").

*(2009 Supp.)*

**Instruction No. 23.32**

**DURESS**

Duress relieves a party of the duty to perform a contract. A party was under duress if [he/she] was forced to make a contract by wrongful acts that left that party with no reasonable choice but to agree to the contract on the other party's terms. Wrongful acts are those acts that involve bad faith coercion or compulsion. In deciding whether there was duress you should consider the nature of such acts and the characteristics of the party claiming duress. This would include [his/her] age, gender, physical and mental condition, as well as the other circumstances surrounding the making of the contract.
Notes on Use

This Instruction should be used when evidence has been submitted that would be sufficient to support a jury's finding of duress. The burden of proof for this defense is the greater weight of the evidence, and accordingly, it is not set forth in the text of the Instruction, because the general burden of proof would normally be given in Instruction No. 3.1.

Comments

_Centric Corp. v. Morrison-Knudsen Co.,_ 731 P.2d 411 (Okla. 1986) has an extended discussion of duress. The Oklahoma Supreme Court observed that the common law's limitation of duress to cases involving false imprisonment or threats of physical violence had been codified in 15 O.S. 1991 § 55, but that the common law rule had been relaxed so that duress could consist of acts other than those set out in § 55. 731 P.2d at 415. Duress now includes menace, as defined in 15 O.S. 1991 § 56, and economic duress.

The second sentence of this Instruction is based on the Centric opinion's summary of the holding from the earlier case of _Samuels Shoe Co. v. Frensley_, 151 Okla. 196, 200-01, 3 P.2d 216, 221 (1931):

1. Duress exists if one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances depriving one of the exercise of a free will.

2. Duress exists if one is deprived of an unfettered will or understanding, by threats or other unlawful means, resulting in an involuntary execution of a contract.

3. The existence of duress is measured not by the nature of the acts or threats but by the state of mind induced by the threats or acts.

4. If the threats extinguish the exercise of free will power, the contract may be avoided for duress.

731 P.2d at 415.

The last two sentences of the Instruction are based on the following statements from the Centric opinion:

Obviously, each case must rise and fall on its own merits. The means employed, the age, gender, physical condition, mental characteristics, and the environment of the complaining party are some of the matters which properly may be considered
in determining the question [of duress]. Generally, the issue is one of fact to be
determined after consideration of all the circumstances surrounding the
transaction.

731 P.2d at 417.

**Instruction No. 23.33**

**FRAUD**

Fraud relieves a party of the duty to perform a contract. Fraud includes any
statement [or act] that is intended to deceive another party in order to influence [him/her]
to enter into the contract. In addition, the party must have relied on the fraudulent
statement [or act] in entering into the contract. Fraud consists of:

1. A suggestion, as a fact, of something that is not true, when the person making
   the suggestion does not believe it to be the truth; or

2. A positive statement of something that is not true, when the person making it
   had no reasonable basis for the statement; or

3. A person's concealing something that [he/she] knows is the truth; or

4. A promise made without any intention of performing it; or

5. A person's remaining silent when [he/she] had a duty to speak. [Plaintiff] had
   a duty to tell [Defendant] about [the information that was not disclosed]
   because [give the specific reason for this duty of disclosure]; or

6. Any other statement [or act] intended to deceive.

Fraud must be proven by clear and convincing evidence. This means you must be
persuaded, considering all the evidence in the case, it is highly probable and free from
serious doubt that the contract was obtained through fraud.
Notes on Use

The bracketed word "act" in the second and third sentences should be substituted for the word "statement" where the alleged fraud consisted of conduct rather than words. The court should include in the Instruction only those examples supported by the evidence. If constructive fraud is alleged as a defense, the court should provide the basis for the duty of disclosure in the fifth example of what fraud may consist of.

Comments

This Instruction is based on 15 O.S. 1991 §§ 58-59. Section 58 defines actual fraud as follows:

Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

2. The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true.

3. The suppression of that which is true, by one having knowledge or belief of the fact.

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive.

In Varn v. Maloney, 516 P.2d 1328, 1332 (Okla. 1973), the Oklahoma Supreme Court set out the elements of fraud as follows:

The essential elements of fraud are well settled. The proof must show a material false representation, made with knowledge of its falsity or recklessly without knowledge as to its truth or falsity, as a positive assertion, with the intention that it be acted upon by another, who does act in reliance thereon, to his injury. [Citation omitted.]. No "guarantee" is required.

It is equally well settled that the concealment of material facts which one is bound to disclose, may constitute fraud.

As is provided in Section 58 and stated in the Instruction, fraud may consist of the making of a promise with no intention of performing it. Citation Co. Realtors, Inc. v. Lyon, 610 P.2d 788, 790 (Okla. 1980), has the following discussion of this point:
Oklahoma follows the view that fraud can be predicated upon a promise to do a thing in the future when the intent of the promisor is otherwise. This principle is an exception to the general rule that for a false representation to be the basis of fraud, such representation must be relative to existing facts or those which previously existed, and not as to promises as to future acts. . . . The gist of the rule is not the breach of promise but the fraudulent intent of the promisor at the time the pledge is made not to perform the promise and thereby deceive the promisee. There is a wide distinction between the nonperformance of a promise and a promise made mala fide, only the latter being actionable fraud.

Section 59 provides the following definition of constructive fraud:

Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

For discussions of constructive fraud, see Silk v. Phillips Petroleum Corp., 760 P.2d 174, 179 (Okla. 1988) ("If on account of peculiar circumstances there is a positive duty on the part of one of the parties to a contract to speak, and he remains silent to his benefit and to the detriment of the other party, the failure to speak constitutes fraud."); Sellers v. Sellers, 428 P.2d 230, 237 (Okla. 1967) ("Where a confidential relationship exists between parties to a transaction, there is no privilege of non-disclosure, and if a party to the relationship fails to make full disclosure of all material facts, the nondisclosure has the effect of a material misrepresentation.").

The Oklahoma Supreme Court emphasized in Steiger v. Commerce Acceptance of Okla. City, Inc., 455 P.2d 81, 89 (Okla. 1969), that "fraud may not be presumed, but must be shown by clear and satisfactory evidence."
**Instruction No. 23.34**

**Undue Influence**

A party need not perform a contract which was entered into as a direct result of undue influence. Undue influence involves:

1. The misuse of a confidential relationship [or a position of authority] to take an unfair advantage over another person; or
2. Taking an unfair advantage of another person's weakness of mind; or
3. Taking a grossly oppressive and unfair advantage of another person's misfortune [or circumstances].

**Notes on Use**

The court should include in the Instruction only the particular category of undue influence which is supported by the evidence.

**Comments**

This Instruction tracks 15 O.S. 1991 § 61, which provides:

Undue influence consists:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.
2. In taking an unfair advantage of another's weakness of mind; or,
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

The requirement that the contract must have been "made as a direct result" of the undue influence is based on the holding in *Vails v. Southwestern Bell Tel. Co.*, 504 F. Supp. 740, 744 (W.D. Okla. 1980), that a party seeking to set aside a contract on the ground of undue influence "must show not only that such influence existed and that it was exercised, but also that it was exercised effectively; that is, that it was the efficient cause

Instruction No. 23.35

MISTAKE

Mistake relieves a party of the duty to perform a contract that does not express the true agreement of the parties, if:

1. That party was not careless in making the contract;
2. The mistake affects the basic purpose of the contract, and;

[CHOOSE ONE OF THE FOLLOWING]

3. The mistake was common to both parties.

OR

3. There was fraud [or unfair conduct] on the part of the other party to the contract.

Mistake must be proven by clear and convincing evidence. This means you must be persuaded, considering all the evidence in the case, that it is highly probable and free from serious doubt that the contract was entered into as a result of the mistake.

Notes on Use

The first alternative for subparagraph 3 in the Instruction should be used where cancellation is sought on the ground of mutual mistake, and the second alternative should be used where cancellation is sought on the ground of unilateral mistake.

Comments

15 O.S. 1991 § 52 authorizes rescission of a contract if consent is not free, and 15 O.S. 1991 § 53 provides that consent is not free inter alia when it is obtained through mistake. A mistake of fact is defined in 15 O.S. 1991 § 63 as follows:
Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,

2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

Mistakes of law are defined in 15 O.S. 1991 § 64 as follows:

Mistakes of law constitute a [sic] mistake within the meaning of this article only when it arises from:

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

In Percival Constr. Co. v. Miller & Miller Auctioneers, Inc., 532 F.2d 166, 172 (10th Cir. 1976), the Tenth Circuit Court of Appeals emphasized the distinction between mutual and unilateral mistakes. With respect to mutual mistakes, it held: "Oklahoma law is clear that when the minds of contracting parties fail to meet because of a mutual mistake which goes to the essence of the agreement, there is no contract and the contract is unenforceable." On the other hand, it also held that with respect to a unilateral, rather than a mutual, mistake as follows: "Under Oklahoma law, where one party to a contract makes a mistake, but that mistake is not known to the other party, the contract is not invalidated." Id.

The latter statement from the Percival decision implies that a contract would be voidable on account of a unilateral mistake by one party if the other party was aware of that party's mistake. However, other cases indicate that in order for a unilateral mistake to warrant relief in Oklahoma, there must be fraud or inequitable conduct by the party against whom relief is sought. In Boettler v. Rothmire, 442 P.2d 511, 515 (Okla. 1968),
the Oklahoma Supreme Court set out the standard for reformation of a contract based on mistake as follows:

When the execution of a written contract is procured, either through mutual mistake, or through mistake on the part of one and fraud or inequitable conduct on the part of the other, and the contract fails to express the real agreement and intent of the parties, a court of equity will grant the reformation of the instrument to speak the truth.

Similarly, in *Ohio Casualty Ins. Co. v. Callaway*, 134 F.2d 788, 789 (10th Cir. 1943), a case from Oklahoma, the Tenth Circuit explained:

It is a rule of universal application that where parties orally agree upon the terms of a written contract, but either through mutual mistake or through mistake on the part of one, and fraud or inequitable conduct on the part of the other, the written agreement drafted to evidence the oral contract fails to express the real agreement and intention of the parties, equity may grant reformation of the written contract to comply with the antecedent oral agreement. But courts of equity will not make a contract for the parties, and evidence of mutual mistake, fraud, or inequitable conduct relied upon to support reformation must be shown by proof of the greatest and most satisfactory character, and the parties seeking reformation must also be free from fraud, inequitable conduct, or negligence. (footnotes omitted)

See also *Cleary Petroleum Corp v. Harrison*, 621 P.2d 528, 533 (Okla. 1980) (for equity to order reformation of a deed "requires a plaintiff to show (a) some antecedent agreement to the terms of which the instrument should be reformed, (b) mutual mistake or mistake on part of one and fraud or inequitable conduct on part of the other, as a result of which the instrument reflects something neither party had intended and (c) proof of these elements by clear and convincing evidence.") (emphasis in original); *Watkins v. Grady County Soil & Water Conservation Dist.*, 438 P.2d 491, 492 (Okla. 1968) ("A unilateral mistake of fact going to the essence of the contract may be ground for equitable cancellations.") (Syllabus by the Court); *Dennis v. American-First Title & Trust Co.*, 405 P.2d 993, 997 (Okla. 1965) ("It is a also a well-established rule of this Court that in order to justify a written reformation of a written contract, the proof must be full, clear and unequivocal and sufficiently convincing to establish the facts to a moral certainty."); *Seigle v. Hamilton-Carhartt Cotton Mills*, 89 Okla. 68, 70, 213 P. 305, 307 (1922) ("The rule is that, if the mistake of one party to the contract is not known to the other, it can
have no effect on the contract."); Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 835 (10th Cir. 1986) ("Under Oklahoma law, to justify a change in a written contract on the ground of mutual mistake, the party seeking reformation must show that he was free of neglect in making the agreement."); Hayes v. Travelers Ins. Co., 93 F.2d 568, 570 (10th Cir. 1937) ("[A]bsent fraud or inequitable conduct on the part of one, the mistake must be mutual.").

Instruction No. 23.36

IMPOSSIBILITY

A party is relieved from the duty to perform a contract if:

1. It has become impossible to perform because of an occurrence that was beyond the control of the parties; and

2. Neither of the parties could reasonably foresee the occurrence when they made the contract.

Notes on Use

This Instruction should be used when there is a jury question involving strict impossibility. For cases involving impracticability, see Instruction No. 23.37.

Comments

Traditionally, the defense of supervening impossibility of performance has been based on there being an implied condition that whatever is essential for performance will continue to exist and be available when performance is due. Tulsa Opera House Co. v. Mitchell, 165 Okla. 61, 64, 24 P.2d 997, 1000 (1933). This approach has been rejected by the Uniform Commercial Code and the Restatement (Second) of Contracts (1979) in favor of an approach in which the central inquiry is whether the non-occurrence of an event was a basic assumption on which the contract was made. Restatement (Second) of Contracts, Chapter 11 Introductory Note, at 311 (1979). The difference between these approaches is that the parties would not need to have addressed themselves to the possibility of the non-occurrence of an event in order for its non-occurrence to have been a basic assumption of the contract. To illustrate, the Restatement (Second) of Contracts
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gives the example of an artist's contract to paint a painting. The possibility of the artist dying would be an event the non-occurrence of which was a basic assumption of the contract, and the artist's death would give rise to a defense of impossibility even though the parties had not consciously addressed the possibility when they made the contract. Determining whether the non-occurrence of an event was a basic assumption requires a decision as to which party assumed the risk of the non-occurrence. Id.

With respect to contracts for the sale of goods, 12A O.S. 1991 § 2-615 provides in pertinent part for the excuse to performance by failure of a presupposed condition as follows:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

Restatement (Second) of Contracts § 261 (1979) provides for discharge of a contract by supervening impracticability as follows:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Three common grounds for impossibility of performance are 1) the death or incapacity of a particular person who is necessary for performance (see Restatement (Second) of Contracts § 262 (1979)); 2) the destruction or failure to come into existence of a thing necessary for performance (see Restatement (Second) of Contracts § 263 (1979)); and 3) the prohibition of performance by a governmental regulation or order (see Restatement (Second) of Contracts § 264 (1979)). In Oklahoma Gas & Elec. Co. v. Pinkerton's Inc., 742 P.2d 546, 548 (Okla. 1986), the Oklahoma Supreme Court ruled
that this defense requires that it is impossible for anyone to perform (objective impossibility), rather than merely that it is impossible for the promisor to perform (subjective impossibility). Unless the contract provides otherwise, the risk of subjective impossibility is on the promisor. \textit{Id. See also} Restatement (Second) of Contracts § 261, comment e, at 318 (1979) ("a party generally assumes the risk of his own inability to perform his duty").

\textbf{Instruction No. 23.37}

\textbf{COMMERCIAL IMPRACTABILITY}

A party is relieved from the duty to perform a contract if:

1. The cost of performing it has become totally unreasonable or impracticable because of an occurrence that was beyond the control of the parties; and

2. Neither of the parties could reasonably foresee the occurrence when they made the contract.

\textbf{Notes on Use}

This Instruction should be used when there is a jury question involving impracticability. For cases involving strict impossibility, see Instruction No. 23.36.

\textbf{Comments}

The judgment was reversed in \textit{Kansas, O. & G. Ry. v. Grand Lake Grain Co.}, 434 P.2d 153 (Okla. 1967), on account of the trial judge's refusal to give a jury instruction on impracticability. The \textit{Kansas, O. & G. Ry.} case arose out of a grain processing company's shipping contract with a railroad. The construction of a dam on the Grand River caused approximately 19 miles of the railroad's tracks to be flooded. Because relocation of the tracks would cost over $3 million, the railroad ceased its operations, and the grain company sued for breach of the shipping contract. On appeal from a $15,000 in the grain company's favor, the Oklahoma Supreme Court reversed, holding that "the more modern rule of supervening impossibility means not only actual strict impossibility, but impracticability arising from extreme and unreasonable difficulty, loss injury or
expense. . ." 434 P.2d at 158. See also Cosden Oil & Gas Co. v. Moss, 131 Okla. 49, 53, 267 P. 855, 859 (1928) ("the terms 'impractical' and 'impossible' are of equal legal effect").

Impracticability requires more than mere inconvenience or impracticality. This point is emphasized in the Comments to 12A O.S.Ann. § 2-615 (West 1963) and Restatement (Second) of Contracts § 261 (1979). 12A O.S.Ann. § 2-615 comment 2 (West 1963) states in part:

Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section.

See also Golsen v. ONG Western, Inc., 756 P.2d 1209, 1213 (Okla. 1988) (quoting the first two sentences above). And Restatement (Second) of Contracts § 261 comment d (1979) states in part:

Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved. A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule stated in this Section. Performance may also be impracticable because it will involve a risk of injury to person or to property, of one of the parties or of others, that is disproportionate to the ends to be attained by performance. However, "impracticability" means more than "impracticality." A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover.
**Instruction No. 23.38**

**PREVENTION OF PERFORMANCE**

A party is relieved of the duty to perform a contract if the other party to the contract prevented [him/her/it] from performing.

**Notes on Use**

This Instruction should be used where evidence is offered that the promisor's performance was prevented by the promisee.

**Comments**

This defense is illustrated by *Chilton v. Oklahoma Tire & Supply Co.*, 180 Okla. 39, 67 P.2d 27 (1937). The defendant was a service agent who had agreed to service refrigerators that the plaintiff sold to the customers in its sales territory. In defense to a suit for breach of contract, the defendant claimed that the plaintiff prevented it from performing the contract by causing the manufacturer of the refrigerators to remove it as the service agent. The Oklahoma Supreme Court ruled in the defendant's favor, holding in the Syllabus by the Court: "Nonperformance of a contract in accordance with its terms is excused if performance is prevented by the conduct of the adverse party." *See also King v. Board of Regents, Claremore Junior College*, 541 P.2d 836, 841 (Okla. 1975) (tenured teachers who abandoned their positions were not entitled to reinstatement).

**Instruction No. 23.39**

**WAIVER**

A party is relieved of the duty to perform a contract if the other party to the contract:
1. Voluntarily and intentionally gave up the right to require performance of the contract.

OR

2. By acts or conduct, indicated an intent not to enforce the contract so that a reasonable person would think that performance of the contract was no longer required.

Notes on Use

This Instruction should be used if there is a jury question concerning the promisee's waiver of a breach of contract. The first alternative above should be used if the alleged waiver was express, and the second alternative should be used if the alleged waiver was implied.

Comments

Waiver is recognized as a defense to performance of a contract. *Johnson v. E.V. Cox Constr. Co.*, 620 P.2d 917, 920 (Okla. Ct. App. 1980) ("Contracting parties can expressly or implicitly waive performance violations and assent to contractually proscribed procedures."). See also 12A O.S. 1991 § 2-209 (providing that waiver may result from an unsuccessful attempt at modification or rescission of a contract; also providing for retraction of waiver).

In *Robberson Steel Co. v. Harrell*, 177 F.2d 12, 15 (10th Cir. 1949), the Tenth Circuit Court of Appeals described the essential elements of waiver as follows: "It is the law in Oklahoma that a waiver is the intentional relinquishment of a known right. To be operative, there must be knowledge of the existence of the right and an intention to relinquish it." Although the description of waiver in the *Robberson Steel* case was limited to express waiver, waiver may also be implied. This is shown by the following definition of waiver used in the Syllabus by the Court in *Campbell v. Frye*, 145 Okla. 213, 213, 292 P. 7, 7 (1930): "A party to a contract may waive a right by conduct or acts which indicate an intention to relinquish it, or by such failure to insist upon it that the party is estopped to afterwards set it up against the other signatory party." See also *Westinghouse Credit Corp. v. Shelton*, 645 F.2d 869, 874 (10th Cir. 1981) (waiver may result from course of performance).
Instruction No. 23.40

**RELEASE; SUBSTITUTE CONTRACT; ACCORD AND SATISFACTION**

One party may agree to release another party from a duty to perform under a contract, and once that is done, the other party is no longer required to perform.

OR

The parties to a contract may agree to substitute another contract in its place. Once they so agree, they are no longer required to perform under the first contract. Instead, they are required to perform under the substitute contract.

OR

A party may agree to accept from another party a performance under a contract different from the performance that was originally due. Performance of the new agreement discharges the original duty to perform. On the other hand, if the new agreement is not performed, then performance under the original agreement is required.

**Notes on Use**

The trial court should select the appropriate paragraph above that fits the facts of the case. The first paragraph should be given if there is a jury question concerning the rescission of a contract by the agreement of the parties. The second paragraph covers cases involving substituted contracts. The third paragraph deals with accord and satisfaction, which differs from a substituted contract in that the party to an accord and satisfaction does not give up the rights under the original contract until the accord has been performed. The last sentence should be revised if the promissee elects to sue for breach of the accord.

**Comments**

15 O.S. 1991 § 233 (5) provides: "A party to a contract may rescind the same . . . [b]y consent of all the other parties." See also Restatement (Second) of Contracts § 275
If a party, before he has fully performed his duty under a contract, manifests to the other party his assent to discharge the other party's duty to render part or all of the agreed exchange, the duty is to that extent discharged without consideration.

In addition, the parties may agree to have a contract superseded by a subsequent agreement. For example, in Shawnee Hosp. Auth. v. Dow Constr., Inc., 812 P.2d 1351 (Okla. 1990), a settlement agreement was found to have superseded a construction contract so that the construction contract's arbitration clause was no longer enforceable. The Oklahoma Supreme Court explained:

Before full performance, contractual obligations may be discharged by a subsequent agreement whose effect is to alter, modify or supersede the terms of the original agreement or to rescind it altogether. A claim under an earlier contract will be governed by a later agreement if the latter operates to supersede or rescind the former.

812 P.2d at 1353 (footnotes omitted). See also Restatement (Second) of Contracts § 279 (1979), which provides:

1. A substituted contract is a contract that is itself accepted by the obligee in satisfaction of the obligor's existing duty.

2. The substituted contract discharges the original duty and breach of the substituted contract by the obligor does not give the obligee a right to enforce the original duty.

A party who does not want to give up the rights under an existing contract until the other party has performed a substitute promise may make an accord instead of a substituted contract. Then the party's rights under the original contract will not be discharged until there is satisfaction of the accord by performance of the substitute promise. In Gasper v. Mayer, 171 Okla. 457, 461, 43 P.2d 467, 472 (1935), the Oklahoma Supreme Court described an accord and satisfaction as follows:

An "accord" is an agreement whereby one of the parties undertakes to give or perform, and the other to accept in satisfaction of a claim, demand or debt, either liquidated or unliquidated and unadjusted, and arising either from contract or tort, something other than or different from what he is, or considers himself, entitled to, and a "satisfaction" is the execution of such agreement. Accord and satisfaction, then, is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement, and forms
a complete bar to any further action on the original claim. It is a substitution by agreement of the parties of something else in place of the original claim. It must be an executed contract, found upon a new consideration.

See also Zenith Drilling Corp. v. Internorth, Inc., 869 F.2d 560, 563 (10th Cir. 1989), where the Tenth Circuit held that a party's prior contractual obligations were not discharged until the terms of an accord were satisfied. The Tenth Circuit relied upon the following principles:

An executory accord is an agreement for the discharge of an existing claim by a substituted performance, but one in which the extinguishment of the prior obligation is conditioned upon the performance of the accord. [Citation omitted.]. Incomplete performance or nonperformance of an accord does not discharge the original contractual obligations.

Restatement (Second) of Contracts § 281 (1979) has the following definition of an accord and satisfaction:

(1) An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty.

(2) Until performance of the accord, the original duty is suspended unless there is such a breach of the accord by the obligor as discharges the new duty of the obligee to accept the performance in satisfaction. If there is such a breach, the obligee may enforce either the original duty or any duty under the accord.

(3) Breach of the accord by the obligee does not discharge the original duty, but the obligor may maintain a suit for specific performance of the accord, in addition to any claim for damages for partial breach.

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**Instruction No. 23.41**

**RESCISSION**

There are a number of reasons why a contract may be canceled so that a party's performance under it is excused. In this case, [Defendant] claims that the contract was
canceled and his performance under it was excused because [state the basis for rescission, e.g., fraud, duress, etc.]. Besides proving [repeat the basis for rescission], [Defendant] must also prove that [he/she] notified [Plaintiff] that [he/she] was canceling the contract promptly after discovering the [repeat the basis for rescission]. [Defendant] must also prove that [he/she] returned everything of value that [he/she] had received from [Plaintiff] under the contract.

**Notes on Use**

Before allowing a case involving rescission of a contract to go to the jury, the trial judge must first determine whether the basis for rescission is legal or equitable. See 15 O.S.1991 § 233A (1991) ("The method of trial to be afforded shall depend on the relief to which the party who brought suit on the theory of rescission is entitled."). This Instruction should be used with the appropriate preceding Instructions covering the grounds for rescission.

**Comments**

15 O.S. 1991 § 232 provides as follows for rescission of contracts:

A party to a contract may rescind the same in the following cases only:

1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

2. If through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part.

3. If such consideration becomes entirely void from any cause.

4. If such consideration, before it is rendered to him, fails in a material respect, from any cause; or,

5. By consent of all the other parties.

15 O.S.1991 § 235 imposes the following obligations on a party who seeks rescission of a contract:
Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable, or positively refuses to do so.

See also Sneed v. State ex rel. Dep't of Transp., 683 P.2d 525, 528 (Okla. 1983) ("Failure to prove restoration is fatal to plaintiffs' cause of action."); Berland's Inc., of Tulsa v. Northside Village Shopping Ctr., Inc., 506 P.2d 908, 912 (Okla. 1972) ("The asserted willingness of the one who seeks rescission to restore the opposite party to the status quo is a condition precedent to rescission.").

A jury trial is appropriate in a case for rescission only if it arises in law, rather than in equity. See 15 O.S. 1991 § 233A ("The method of trial to be afforded shall depend on the relief to which the party who brought suit on the theory of rescission is entitled."). The Oklahoma Supreme Court decided that a jury trial was appropriate in a case to rescind a contract on the grounds of fraud in National Found. Life Ins. Co. v. Loftis, 425 P.2d 946 (1966). In reaching its decision, the Supreme Court focused on whether the contract's rescission was the result of the acts of one of the parties. It reasoned:

If a contract is rescinded by the act of the party it follows that in a suit for the recovery of money paid, no preliminary action of the court is necessary in order for the plaintiff to establish her right to recover the money paid. Therefore, in such a case, the action is one in law rather than in equity.

425 P.2d at 949. In contrast, the Supreme Court held in Berland's Inc., of Tulsa v. Northside Village Shopping Ctr., Inc., 378 P.2d 860 (Okla. 1963), that a suit for rescission of a lease because of a partial failure of performance that defeated the object of the contract was "an action of equitable cognizance, and [was] governed by principles of equity." 378 P.2d at 862.
PART FIVE --- REMEDIES

Instruction No. 23.51

GENERAL MEASURE OF DAMAGES

If you decide for [Plaintiff] on [his/her/its] claim for breach of contract, you must then fix the amount of [his/her/its] damages. This is the amount of money that is needed to put [him/her/it] in as good a position as [he/she/it] would have been if the contract had not been breached. In this case, the amount of damages should be determined as follows: [set out the appropriate measure of damages].

Notes on Use

This Instruction should be given if there is a jury question concerning the amount of damages. In the last sentence, the trial judge will need to tell the jury how to calculate damages for the particular type of contract that is involved in the case.

For example, if the plaintiff is a seller of goods seeking damages for the buyer's breach, the last sentence might read: "In this case, the amount of damages would be the
price stated in the contract that has not been paid." If the seller's expenses were reduced by virtue of its performance being excused on account of the buyer's breach, this sentence might read: "In this case, the amount of damages would be the price stated in the contract that has not been paid, minus any costs that [Plaintiff] saved by not having to perform [his/her/its] part of the contract." In addition, if the seller seeks recovery for incidental expenses that have been incurred as a result of the buyer's breach, then they should be listed as well. Incidental expenses might include costs for transporting, storing, and reselling the goods after the buyer's breach.

On the other hand, if the plaintiff is a buyer of goods seeking damages for the seller's breach, the last sentence might read: "In this case, the amount of damages would be the difference between the price for the goods stated in the contract and their price from another seller." If the buyer's expenses were reduced by virtue of not buying the goods from the seller, the sentence might read: "In this case, the amount of damages would be the difference between the price for the goods stated in the contract and their price from another seller, minus any costs that [Plaintiff] saved by not buying the goods from [Defendant]." In addition, if the buyer seeks recovery for incidental expenses that have been incurred as a result of the seller's breach, then they should be listed as well. Incidental expenses might include costs for obtaining substitute goods after the seller's breach.

If the plaintiff is a property owner seeking damages for a builder's breach of a construction contract, the last sentence of the Instruction above might read: "In this case, the amount of damages would be the reasonable cost of completing the construction required by the contract." If the cost of completing the construction would be substantially more than the increased value from completion, the last sentence should read instead: "In this case, the amount of damages would be the difference between the value of what [Plaintiff] would have received if the contract had not been breached and the value of what [Plaintiff] actually received." If the plaintiff is a builder seeking damages for a property owner's breach of a construction contract, then the last sentence might read: "In this case, the amount of damages would be the price stated in the contract that has not been paid." If the builder seeks damages for substantial performance, Instruction No. 23.56 should be given instead of this Instruction No. 23.51.

If the plaintiff is a former employee seeking damages for breach of an employment contract, the last sentence of the first paragraph above might read: "In this
case, the amount of damages would be the difference between the amount that [Plaintiff] was entitled to under the employment contract and what [he/she] has earned since its breach [or could have earned using reasonable diligence in finding employment of comparable quality as the employment with [Defendant]]; [and the loss of earnings in the future that [Plaintiff] is reasonably likely to suffer as a direct result of the breach, if [he/she] used reasonable diligence in finding employment of comparable quality.]

Comments

23 O.S. 1991 § 21 provides the following measure of damages in contract cases:

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, 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. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin.

The Restatement (Second) of Contracts (1979) emphasizes protection of a promisee's expectation interest in the benefit of his bargain as the major objective of the law of contract remedies. See Restatement (Second) of Contracts § 344 (1979) (purposes of remedies for breach of contract). The second sentence of this Instruction is based on the following statement in Restatement (Second) of Contracts § 347 comment a (1979):

Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.

See also Osborn v. Commanche Cattle Indus., Inc., 545 P.2d 827, 831 (Okla. Ct. App. 1975), where the Court of Appeals explained the objectives of the law of damages in contract cases as follows:

The law of damages permits recovery of lost profits to protect the injured promisee's "expectation interest," his prospect of net gain from the contract. [Citations omitted.]. This interest is given legal protection to achieve the paramount objective of putting the promisee injured by the breach in the position in which he would have been had the contract been performed.
Instruction No. 23.52

UNCERTAINTY AS TO FACT OR AMOUNT OF DAMAGES

In order to award damages to [Plaintiff] you must be satisfied by the greater weight of the evidence that [he/she/it] did in fact suffer a loss which was caused by the breach. Once you are satisfied that [Plaintiff] did suffer such a loss, you should award damages even if you are uncertain as to the exact amount. The amount of damages does not have to be proved with mathematical certainty, but there must be a reasonable basis for the award.

Notes on Use

This Instruction should be given whenever there is uncertainty as to the fact or amount of damages. It will generally be appropriate in cases where damages for lost profits are being sought.

Comments

23 O.S. 1991 § 21 provides in pertinent part: "No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin." The Oklahoma cases have required greater certainty as to the existence of damages than to their amount. The Tenth Circuit Court of Appeals had the following summary of the Oklahoma law on this subject in General Fin. Corp. v. Dillon, 172 F.2d 924, 930 (10th Cir. 1949):

The general rule of damages is that damages for the breach of a contract cannot be recovered unless they are clearly ascertainable, both in their nature and origin, and unless it is established they are the natural and proximate consequences of the breach and are not contingent or speculative. This is also the rule in Oklahoma.

It is also well settled that the amount of damages resulting from such a breach must be ascertainable with some degree of certainty and may not be based on mere speculation and conjecture alone. But when a breach of a contractual
obligation with resulting damage has once been established, the mere uncertainty as to the exact amount of damages will not preclude the right to a recovery. In such cases it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference although the result may be only approximate. (footnotes omitted)

For additional case authority, see Ferrell Constr. Co., Inc. v. Russell Creek Coal Co., 645 P.2d 1005, 1010 (Okla. 1982) ("uncertainty as to the amount of damages does not prevent recovery, and where it clearly appears that loss of profits to a business had been suffered, it is proper to let the jury determine what the loss probably was from the best evidence the nature of the case admitted") (emphasis in original) (quoting from Firestone Tire & Rubber Co. v. Sheets, 178 Okla. 191, 62 P.2d 91 (1936)); Hardesty v. Andro Corp., 555 P.2d 1030, 1034 (Okla. 1976) ("The prohibition of recovery of damages because of uncertainty and too speculative in nature applies to the fact of damage and not to the amount of damage.") (quoting from Martin v. Griffin Television, Inc., 549 P.2d 85, 92 (Okla. 1976)); Megert v. Bauman, 206 Okla. 651, 653, 246 P.2d 355, 358 (1952) ("It is not necessary that profits be established with absolute certainty and barring any possibility of failure. It is only required that it be established with reasonable certainty that profits would have been made had not the contract been breached.").

**Instruction No. 23.53**

**FORESEEABILITY OF SPECIAL DAMAGES**

In addition to other damages, [Plaintiff] claims [he/she/it] is entitled to recover damages for [list items of special damages]. In order for you to award [Plaintiff] damages for these losses, you must be satisfied by the greater weight of the evidence either that they are the kind that would ordinarily result from a breach of the contract, or else that at the time the contract was made [Defendant] knew these losses would result from a breach.
Notes on Use

This Instruction should be used when the promisor claims that some of the damages sought by the promissee were not foreseeable, and there is a jury issue as to the foreseeability of damages.

Comments

Under the rule of Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854), damages for breach of contract are limited to losses that were foreseeable at the time of contracting. This rule is summarized in Restatement (Second) of Contracts § 351 comment a (1979) as follows:

A contracting party is generally expected to take account of those risks that are foreseeable at the time he makes the contract. He is not, however, liable in the event of breach for loss that he did not at the time of contracting have reason to foresee as a probable result of such a breach. The mere circumstance that some loss was foreseeable, or even that some loss of the same general kind was foreseeable, will not suffice if the loss that actually occurred was not foreseeable. It is enough, however, that the loss was foreseeable as a probable, as distinguished from a necessary, result of his breach.

Oklahoma courts recognize the limitation on damages to foreseeable losses. See Coker v. Southwestern Bell Tel. Co., 580 P.2d 151, 153 (Okla. 1978) ("As a general rule in this jurisdiction, the recovery of damages in cases of breach of contract have [sic] been controlled by the rule of law first announced in Hadley v. Baxendale, 9 Exch. 341, 156 Eng.Reprint 145 (1854)."); Missouri P.R.R. v. Ridley, 383 P.2d 227, 229 (Okla. 1963) (following Hadley).

Instruction No. 23.54

UNNECESSARY LOSSES (MITIGATION)

Recovery of damages is not allowed for any losses that [Plaintiff] reasonably could have avoided.

Notes on Use

This Instruction should be used when there is a jury question concerning a promissee's failure to mitigate damages.
Comments

A party who asserts a claim for breach of contract has a duty to use reasonable efforts to mitigate his damages. *Hidalgo Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, 200 (10th Cir. 1980); *Sabine Corp. v. ONG Western, Inc.*, 725 F. Supp. 1157, 1186 (W.D. Okla. 1989) ("The party asserting a breach of contract has a duty, under Oklahoma law, to make all reasonable efforts to minimize his damages."). The removal of avoidable damages from the recovery for breach of contract encourages promisees to attempt to minimize their losses. The principle of mitigation of damages is summarized in Restatement (Second) of Contracts § 350 comment (1979) as follows:

As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts. Once a party has reason to know that performance by the other party will not be forthcoming, he is ordinarily expected to stop his own performance to avoid further expenditure. . . . Furthermore, he is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss by making substitute arrangements or otherwise.

A promisee is not required to go to extraordinary lengths or expense to avoid loss; only efforts that are reasonable under the circumstances are necessary. This point was emphasized in *Smith-Horton Drilling Co. v. Brooks*, 199 Okla. 63, 182 P.2d 499, 502 (1947), where the Oklahoma Supreme Court held:

One who is injured by the acts of another is required to do that which an ordinary prudent person would do under similar circumstances to mitigate or lessen damages. He is, however, not required to unreasonably exert himself or to incur an unreasonable expense in order to do so.

*See also Hidalgo Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, 200 (10th Cir. 1980) (quoting these statements).

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**Instruction No. 23.55**

**REMEDY: RESCISSION**

**NO INSTRUCTION SHOULD BE GIVEN**
Comments

15 O.S. 1991 § 233B provides that in rescission of contract cases "the court shall adjust the equities between the parties" even though the action is tried to the jury.

Instruction No. 23.56

**MEASURE OF DAMAGES: SUBSTANTIAL PERFORMANCE**

If you find that [Plaintiff] substantially performed the contract, then [he/she/it] is entitled to recover the full price stated in the contract that has not already been paid less the cost of correcting any omissions, deviations or defects that [Plaintiff] caused.

If you find that [Plaintiff] did not substantially perform the contract, then [his/her/its] recovery is limited to the reasonable value of [his/her/its] performance less what [he/she/it] has already received.

**Notes on Use**

This Instruction should be used in conjunction with Instruction No. 23.23, which defines the doctrine of substantial performance. It provides a measure of damages based on the contract price less the cost of correcting deficiencies if substantial performance is found, and a remedy in quantum meruit if no substantial performance is found.

**Comments**

This Instruction is based on the following statement in *Stewart v. Riddle*, 76 Okla. 70, 70-71, 184 P. 443, 444 (1919):

Where the building is constructed and substantially completed according to the plans and specifications, the measure of damages for defects in the construction work is cost of repairing the defects, but where the defects are such that they cannot be remedied without the destruction of some substantial part of the benefit which the owner's property has received by reason of the contractor's work, or where the cost of remedying the defect will not fully compensate the owner for damages suffered by him, the measure of damages is the difference between the value of the building as constructed and what it would have been if constructed strictly according to the plans and specifications.
See also Jones v. Featherston, 373 P.2d 16, 21 (Okla. 1962) (quoting this statement from the Stewart opinion).