

Memo on the Contracts Hypo for the Week of Labor Day

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The Question:

Alpha is a very successful artist who produces a range of different types of art in her studio in Bella City (which is the state capital of Ruritania, a state in the US) and in the homes and business premises of her clients. Her work has recently begun to be considered a valuable investment. She has a number of occasional employees whom she hires to manufacture high quality limited edition prints and to help with managing her schedule, driving her to and from the locations where she will work and buying her supplies and delivering Alpha's work to her customers. She employs Gamma as a full-time employee to manage the gallery attached to the studio.

Delta and Alpha signed a contract whereby during the week of September 7-11 Alpha would work at Delta's office on a conceptual work of art reflecting the mission of Delta's business. The week would allow Alpha to focus on understanding the mission in order to reflect it properly in the art work which would be completed at a later stage. The contract provided that Delta would pay Alpha \$20,000 for the week, and set out a schedule for subsequent payments. On September 1 Delta told Alpha that she had changed her mind and had decided that a different artist would be a better fit for the image of the business.

Alpha planned that during the week of September 7-11 her occasional employees would be at work on a couple of new series of prints.

When Delta cancels the arrangement for the week of September 7-11 Alpha calls Epsilon and tells her that a cancellation means that she could work that week on a project with Epsilon that they had tentatively planned for later in the Fall. Epsilon is happy about moving the work forward and they agree that Epsilon will pay Alpha \$20,000 for the week's work.

Alpha agreed to sell one of her prints to Zeta for \$2000 for delivery and full payment on September 1. Zeta paid a deposit of \$500 but after she lost a lot of money in the recent turmoil in the stock market she cannot afford to pay the rest of the money for the print. Zeta called Alpha's studio and explained that she would be unable to buy the print. Gamma quickly found another purchaser who agreed to and did pay \$2000 for the print.

Assume that Delta and Zeta have both breached their contracts with Alpha. Explaining your reasoning, consider what damages Alpha may claim from Delta and Zeta for their breaches of contract.

Comments:

There are two separate contracts issues here involving Delta and Zeta, both of whom have breached their contracts with Alpha.

1. Delta Contract:

The contract here is a contract for the provision of services by Alpha to Delta (Alpha was to "work at Delta's office on a conceptual work of art reflecting the mission of Delta's business." This seems like the comments of the Court in *Bonebrake v Cox* with respect to an artist providing services, but is even more like the provision of services than the example in the case). The question then is whether when Delta breaches the contract she remains liable to pay the full agreed amount of \$20,000 and perhaps the later agreed payments or a smaller amount. From *Parker v Twentieth Century Fox* and *In Re Worldcom* we know that there is a duty to mitigate

damages (unless there is an argument that the purpose of the \$20,000 is to ensure that Alpha will be available (cf our discussion of Parker and note 5 on page 110 (which you had not yet been expected to read when you answered this question)). We know that mitigation involves work that is equivalent, substantially similar, or substantially equivalent. Work that Alpha in fact agrees to do for another client does not seem to involve the sort of issues we saw in Parker or Worldcom.

Whether or not Alpha has a duty to mitigate she did take on an alternate job with Epsilon for the week she had been going to work for Delta. But this is work she had been planning to do anyway, although later, so it is not clear that it makes sense to see doing this work as a mitigation of the damage caused by Delta's breach. On the other hand, to the extent that mitigation is about stopping people sitting around and claiming damages perhaps this work looks like mitigation.

Is Alpha a lost volume seller here (a theory which would allow her to argue that the Epsilon contract was one she was going to take on anyway)? The argument for this does not seem to be as strong as for Michael Jordan (apart from his lack of subjective intent he did look like a lost volume seller) but if the plastic surgeon in *Gianetti v Norwalk Hospital* (a case cited in Worldcom at Casebook page 81) can be a lost volume seller perhaps Alpha can be also.

2. Zeta Contract

This is a contract for the sale of moveable goods governed by Article 2 of the UCC. And this problem involves an analysis of the issues in Neri. With respect to the prints Alpha is a lost volume seller (as a manufacturer Alpha is arguably a better example of a lost volume seller than Retail Marine was in Neri). Under UCC §2-708(2) Alpha could claim "the profit (including reasonable overhead)" she would have made from full performance by Zeta "together with any incidental damages ... due allowance for costs reasonably incurred and due credit for payments or proceeds of resale." Neri tells us to ignore the last phrase where a lost volume seller claims a remedy under this provision. But we do not have any information to calculate Alpha's lost profit or any incidental damages (although the speed with which Gemma finds another purchaser suggests that incidental damages are likely not large.

Under UCC §2-718(2) Alpha has an obligation to return some of the deposit Zeta paid (all but \$500 or 20% of the contract price, whichever is less). Zeta paid a deposit of \$500; 20% of the contract price is \$400, which is less than \$500 so Alpha should return \$100 to Zeta except that the \$100 is subject to offset to the extent that Alpha establishes damages under another provision of Article 2 (see the discussion of UCC §2-708(2) above).

This analysis doesn't really tell us how to think about a situation where the damages owed by Zeta would be greater than the amount of the deposit she had paid - in such a case Alpha would still seek to pursue Zeta for damages, but would the \$400 retained from Zeta's deposit be added to the amount of damages under UCC §2-708(2) or not? The New York Court of Appeals in Neri allowed Retail Marine to recover the damages it established under UCC §2-708(2) without worrying about the implications of UCC §2-718(2).