

4.10 BILATERAL CONTRACTS

F. CONTINGENT CONTRACT (Revised 11/00)

1. Condition Precedent

NOTE TO JUDGE

Very often it is difficult to determine whether a “contingency” is a true condition precedent or is a dependent performance obligation. In the former situation, it is said that there is no contract because the condition upon which the contract itself was formed is lacking. *Duff v. Trenton Beverage Co.*, 4 N.J. 595, 604 (1950). In the later, a contract was formed, but there may be an excuse for non-performance which protects the defaulting party from liability for breach. *Id.* at 605.

Here, *[choose one]* (a) the defendant contends that the parties negotiated only to the point of a tentative agreement and that a final agreement was contingent¹ on the following *[contract term]*; (or) (b) the defendant contends that the parties negotiated a contract which included the following contingency *[contract term]*.² Defendant contends that this contingency had to exist or occur before the defendant had any duty to perform under the contract:

¹ Examples of these types of contracts are real-estate contracts subject to attorney review or financing or contract content on corporate board approval.

² The court determines whether a contract term is a condition or a promise. *See Giumarra v. Harrington Heights, Inc.*, 33 N.J. Super. 178, 190 (App. Div. 1954), *aff'd p.c.*, 18 N.J. 548 (1955).

[state the asserted contingency]

The plaintiff has the burden of proving that the parties reached a final agreement (or that the condition existed, occurred or was excused).

Therefore, to establish his/her right to recover, the plaintiff must prove that:

- a. the parties reached an agreement without the contingency;
- b. if the agreement was tentative (or included the contingency), plaintiff must prove the contingency occurred;³ or
- c. if the contract was tentative (or included the contingency) and the contingency did not occur; plaintiff must prove the non-occurrence was excused. (The judge should relate the evidence to whatever excuse is being asserted).

2. Excuses for Failure of Condition Precedent

- a. Waiver. Plaintiff has claimed that the right to insist on the condition *[supply facts of condition asserted]* has been waived by the defendant. [See Section 4.d. *infra*, for elements of waiver.]
- b. Estoppel. Plaintiff has claimed that the defendant's right to insist on the occurrence of the condition precedent should be excused because the defendant frustrated or interfered with the occurrence of the condition.⁴ [See Section 4.e. *infra*, for elements of estoppel].

³ The burden of establishing the occurrence of the condition rests upon the party asserting it. *Fitzmaurice v. Van Vlaanderen Machine Company*, 110 N.J. Super. 159 (App. Div. 1970), *aff'd*, 57 N.J. 447 (1971); *Karl Sales and Serv. Inc. v. Gimbel Bros Inc.*, 249 N.J. Super. 487, 493 (App. Div. 1991).

⁴ For example, assume the owner of a house makes a contract with a real estate broker under which the duty to pay the broker a commission is conditioned on the passing of title. If

- c. Interference by Party Claiming Non-occurrence. Plaintiff has claimed that the defendant's right to insist on the occurrence of the condition precedent should be excused because the defendant frustrated or interfered with the occurrence of the condition. If the defendant prevented or hindered plaintiff's performance of the condition then the plaintiff's recovery can not be prevented because the condition precedent did not occur. Thus, if plaintiff proves the defendant interfered with the plaintiff's ability to perform the condition precedent, then the plaintiff would be excused from performing the condition precedent.
- d. Impossibility. Plaintiff has claimed that the defendant's right to insist on the occurrence of the condition precedent should be excused because the occurrence of that condition is an impossibility. [See Section 4.a. *infra*, for elements of impossibility.]

3. **Dependent Covenants as a Condition of Performance**⁵

Plaintiff has claimed that defendant's failure to perform its obligation under the contract [*insert stated obligation*] relieved the plaintiff from performing any of plaintiff's obligations under the contract and entitles plaintiff to damages. Plaintiff must prove that the obligation was vital to the existence of the contract.⁶ In other words, the performance of the defendant's obligation was

the owner wrongfully *prevents* title from passing, the owner is in breach of the contract with the broker and the condition is excused. E. Allan Farnsworth, *Farnsworth on Contracts*, Sec. 8.6, 382 (1990). *N.J. Tanner Associates v. Ciraldo*, 33 *N.J.* 51 (1960).

⁵ As opposed to pure conditions precedent, this section deals with dependent covenants of performance. That is when one promise to perform is so material that the corresponding performance is excused if the dependent promise is not kept.

⁶*Duff v. Trenton Beverage*, 4 *N.J.* 595, 605 (1950).

so important to the contract that the parties contemplated that the plaintiff's corresponding performance was conditioned upon defendant's completion of its performance obligation.⁷

4. Excuses for Non-Performance of a Dependent Covenant

- a. Condition Excused by Impossibility To excuse the condition because of impossibility or impracticability, the party's inability to perform must be because the condition objectively cannot be accomplished.⁸ If the reason the condition cannot be met is a subjective personal inability, then the condition may not be excused.⁹ The plaintiff must prove the performance could not be done and not just that the plaintiff could not do it. If, however, plaintiff agreed to assume the risk that the performance could not be performed and proposed its performance anyway, plaintiff is not excused for non-performance.
- b. Condition Excused by Breach of the Other Party. Plaintiff here claims that plaintiff's failure to perform [*state performance obligation*] was the result of defendant's breach. A [*performance or condition*] can be excused if the other party breaches the contract and causes the nonoccurrence of that performance or condition.¹⁰ If the plaintiff could not or

⁷*Connell v. Parlavecchio*, 255 N.J. Super. 45, 49 (App. Div. 1992); *Seitz v. Mark-O-Lite Sign Contractors, Inc.*, 210 N.J. Super. 646 (Law Div. 1986).

⁸For example, suppose that an owner's duty to make progress payment is conditioned on the contractor furnishing architect's certificates, and though the work is properly done, the architect dies before giving a certificate. E. Allan Farnsworth, *Farnsworth on Contracts*, Sec. 271 (1979) and *Allstate Redevelopment Corp. v. Summit Assoc., Inc.*, 206 N.J. Super 318, 324-325 (App. Div. 1985). See also, Calamari and Perillo, *Contracts*, Sec. 194 (West 1970).

⁹*Duff v. Trenton Beverage Co.*, 4 N.J. 605 (1950); *Seitz v. Mark-O-Lite Sing Contractors, Inc.*, 210 N.J. Super 646 (Law Div. 1986) and *Connell v. Parlavecchio*, 255 N.J. Super 45 (App. Div. 1992). *Restatement of Contracts*, Sec. 301 (1932).

¹⁰E. Allan Farnsworth, *Farnsworth on Contracts*, Sec. 8.6, 379 (1990). *Restatement (Second) of Contracts*, Sec. 235, 245 (1981); *Restatement of Contracts*, Sec. 295.

would not have performed the condition, regardless of the defendant's conduct, the condition is not excused.¹¹

- c. Condition Excused by Repudiation by the Other Party. Plaintiff has claimed that the defendant cannot insist upon part of their agreement which required plaintiff to *[insert performance obligation]* because defendant has repudiated the contract. If a contract is repudiated by one party, a condition of performance may be excused.

In other words, if plaintiff proves that defendant indicated a refusal to honor the contract before *[plaintiff's performance]* could be *[completed or met]*; the defendant cannot insist on the completion of *[plaintiff's performance]* as a condition for his/her performance. If the plaintiff proves that defendant repudiated the contract, plaintiff is excused from *[insert performance obligation]*.¹²

- d. Condition Excused by Waiver. Plaintiff has claimed that defendant has waived the right to insist on performance of the obligation *[insert stated obligation]* relieving the plaintiff of the obligation to perform. To excuse his or her non-performance, the plaintiff must prove that the defendant knowingly gave up his or her right to insist on performance of *[insert the performance obligation]*.¹³ In other words, the

¹¹*Creek Ranch Inc. v. New Jersey Turnpike Authority*, 75 N.J. 421, 432 (1978). See also, *Allstate Redevelopment Corp. v. Summit Associates, Inc.*, 206 N. J. Super. 318, 324-325 (App. Div. 1985) (a condition precedent may be excused where performance is prevented or hindered by a breach of the obligor's duty of good faith and fair dealing).

¹²See *Neptune Research & Development v. Teknics Industry System*, 235 N.J. Super. 522 (App. Div. 1989). For example, an insurance company issues a policy insuring B against theft, and providing that no payment will be made unless written notice is given within 60 days after loss. A loss occurs, and B immediately notifies A by telephone. A repudiates by informing B without adequate reason that it will not pay the loss. Because of this, B does not give written notice to A. B has a claim against A for the amount of the loss, despite failing to comply with the condition. *Restatement (Second) of Contracts*, Sec. 255 (1981) & *Restatement of Contract*, Sec. 306 (1932).

¹³*West Jersey Title and Guaranty Co. v. Industrial Trust Co.*, 27 N.J. 144, 152 (1958). *North v. Jersey Knitting Mills*, 98 N.J.L. 157, 159 (E. & A. 1922); *Petrillo v. Bachenberg*, 263 N.J. Super. 472, 480 (App. Div. 1993), *aff'd* 139 N.J. 472 (1995); *Bertrand v. Jones*, 58 N.J. Super. 273 (App. Div. 1959); *Plassmeyer v. Brenta*, 24 N.J. Super. 322 (App. Div. 1953).

defendant must have known that he or she had the right to insist on the completion of *[insert performance obligation]*, but nevertheless agreed his or her obligation to perform would not depend on the performance of plaintiff's obligation. If plaintiff proves this, plaintiff may be excused from performing his or her obligation.

- e. Condition Excused by Estoppel. Plaintiff claims that defendant should be forbidden from insisting upon performance of *[insert performance obligation]* due to defendant's conduct. Plaintiff must prove that plaintiff's position was changed to plaintiff's detriment by relying upon the defendant's conduct. The plaintiff must prove:
- (1) that the defendant's conduct amounted to a misrepresentation or a concealment of material facts;
 - (2) that the defendant knew or should have known of the true facts;
 - (3) that the plaintiff did not know of the facts concealed or the misrepresentation at the time plaintiff acted upon the defendant's conduct;
 - (4) that the conduct was done by the defendant with the intention that it be acted upon by the plaintiff;
 - (5) that the plaintiff reasonably and justifiably relied on defendant's conduct to plaintiff's detriment or harm.¹⁴
- f. Condition Excused by Failure to Give Adequate Assurances. Plaintiff has claimed that defendant cannot insist upon the part of their agreement which required plaintiff to *[insert performance obligation]*, because defendant has failed to give adequate assurances on his/her/its own performance. If plaintiff had reasonable grounds to believe that the defendant

¹⁴*Palatine I v. Planning Board of Montville*, 133 N.J. 546 (1993); *Foley Machinery v. Amland Contractors*, 209 N.J. Super. 70, 75 (App. Div. 1986); *Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank*, 163 N.J. Super. 463, 479 (App. Div. 1978); *New Jersey Bank v. Palladino*, 146 N.J. Super. 13 (App. Div. 1976), *mod. on other grounds* 77 N.J. 33 (1978); *Clark v. Judge*, 84 N.J. Super. 35, 53 (Ch. Div. 1964), *aff o.b.*, 44 N.J. 550 (1965).

would commit a breach by failing to perform [*insert performance obligation*], plaintiff could rightfully demand reasonable assurances of defendants performance. Plaintiff may also suspend his/her/its own performance until he/she/it receives reasonable assurances of performance from the defendant. If plaintiff proves that defendant failed to provide reasonable assurances of due performance within a reasonable time, plaintiff may treat the defendants failure to give reasonable assurances as a repudiation. [*See Section 4.c., supra, for elements of repudiation.*] If plaintiff did not have reasonable grounds to believe that defendant would fail to perform his/her/its obligations under the contract, then plaintiff's failure to perform is not justified. As a consequence, plaintiff may himself/herself/itself be liable to the defendant for damages for failure to perform obligations.¹⁵ [*See Section 4.b., supra, for elements of material breach.*]

¹⁵*Magnet Resources v. Summit MRI*, 318 N.J. Super. 275, 288 (App. Div. 1999).