

4.10 BILATERAL CONTRACTS

L. CLAIMS OF BREACH (Approved 5/98)

One of the elements that the plaintiff must prove is defendant's breach of contract. Failure to perform a contract in accordance with its terms constitutes a breach of contract. It does not matter if the failure was purposeful or inadvertent.

The plaintiff claims the defendant breached the contract in the following manner:

[State the facts claimed to constitute the breach]

The defendant denies this. The defendant contends *[state contention]*.

A breach may be material or minor.¹ Plaintiff can sue for any breach, even if minor providing the breach causes the plaintiff measurable injury or

¹The generally accepted rule is that “[W]hether a breach is material is a question of fact.” *Farnsworth on Contracts*, Sec. 8.16 (1990). However, New Jersey courts will enforce a contractual provision establishing that a particular breach is grounds for termination of the contract. See *Dunkin’ Donuts of Am., Inc. v. Middletown Donut Corp.*, 100 N.J. 166 (1985) (upholding termination of franchise on basis of contractual provision that made it clear that franchisee’s breach was grounds for termination); *Gorrie v. Winters*, 214 N.J. Super. 103 (App. Div. 1986) (courts shall enforce mutually agreed and expressly stated time of the essence clause), *certif. denied*, 107 N.J. 114 (1987).

Dunkin’ Donuts involved the termination of a doughnut franchise because the franchisee under reported gross sales. Although the Court does not quote the provision of the franchise agreement, it states “the contract quite simply provided that a breach Smothergill (the franchisee) was to be ousted from the stores and lose his right to transfer them for value.” *Id.* at 175. Although the trial court upheld the franchisor’s termination of the franchise, it required the franchisor to compensate the franchisee for the value of the terminated franchise.

damage. When there has been a minor breach that may have caused the plaintiff injury or damage, it is possible for you to conclude that the defendant has nevertheless substantially performed the contract.

To find that the defendant substantially performed the contract, you would have to conclude from the evidence that the defendant made a good faith effort that actually achieved the essential purpose of the contract and provide the plaintiff with the fundamental benefits that plaintiff was supposed to receive from the contract.²

The Supreme Court reversed on the grounds that the breaching party had no right to compensation. The Court explained that although equity abhors a forfeiture, it was not free to change or abrogate the terms of the contract.

The foregoing suggests that because the franchise contracts are clear in making the under reporting of sales a material breach of contract, thereby entitling Dunkin' Donuts to terminate the franchise and receive damages due, equity should and must respect these contractual provisions. (*Id.* at 184).

It is not clear whether the franchise agreement actually described under reporting of income as a “material breach” or whether it simply stated that under reporting was a breach, and any breach was a ground for termination. However, *Dunkin' Donuts* does seem to indicate that the court, not the jury, shall interpret the contract in the first instance, and, if the contract makes clear that certain behavior shall be deemed a material breach (that is, a breach warranting cancellation of the contract), then the matter is an issue of law for the court. In this case, the jury would decide only any factual issues relating to whether the material breach occurred.

²If the defendant substantially performed the contract, it will affect the amount of money damages that can be awarded for the breach of contract. See Chapter 8 Damages Charges.

Now, let me explain what happens if you conclude the breach was not minor but was material. A breach is material if it affects the purpose of the contract in an important or vital way.³ A material breach defeats the purpose of the contract and is inconsistent with the intention of the parties to be bound by the contract terms. When a defendant materially breaches a contract, the plaintiff has a right to terminate the contract and may be excused from further performance of plaintiff's remaining obligations under the contract.⁴ When the plaintiff's promise under the contract was dependent upon the defendant's performance and the defendant fails to perform, then the plaintiff is excused from his/her further performance of his/her promise.⁵

³The Restatement of Contracts sets forth the following criteria for determining whether a breach is material:

- a. the extent to which the injured party will be deprived of the benefit which he/she reasonably expected;
- b. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- c. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- d. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- e. the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. [2 *Restatement, Contracts 2d.* § 241 at 237 (1981)].

⁴*Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990). *Restatement (Second) of Contracts*, § 237 (1981).

⁵*Simonson v. Z. Cranbury Assoc., L.P.*, 149 N.J. 536 (1997).

When a party materially breaches the contract but does not indicate any intention to renounce or repudiate the remainder of the contract, the plaintiff can elect to either continue to perform or cease to perform. If the plaintiff elects to perform, plaintiff is deprived of an excuse for ceasing performance. But even if the plaintiff elects to perform, plaintiff can still sue for any injury or damages suffered because of the material breach.⁶

⁶*Frank Stamato & Co., v. Borough of Lodi*, 4 N.J. 21 (1950).