**PAYMENT MIGHT BE DUE EVEN IF NO CONTRACT**

**By: William G. Morris, Esq.**

Contracts are part of our everyday life. The legal definition of A contract is agreement created by an offer, acceptance of the offer and consideration. A contract must also evidence that the parties have agreed on all essential terms. What is essential can vary based on subject and identity of the parties, as a contract can impliedly incorporate custom and practices in an industry or even an implied provision which is reasonable.

Contracts can be written or oral. Oral contracts suffer from two major 2 problems. First is difficulty in proving terms or even existence of a contract. Second is that some contracts must be in writing to be enforceable.

The most common requirement for a written contract is known as the statute of frauds. The statute of frauds requires contracts for sale of real estate, contracts not to be performed within one year, or agreements to be responsible for another’s debt (among others) be in writing to be enforceable. The basis for the statute is old English law, which felt these types of arrangements were subject to fraud and were of such importance that they should be written to be enforceable.

Acceptance must match the offer. If any term is changed in the acceptance, the acceptance is a counteroffer and must be accepted by the original offeror. Essential terms are those which are so material to the transaction that they must be specified. The law will imply reasonable time for performance under most contracts, even if a time is not included. But the law will not fill in gaps not addressed in an agreement that are material, such as price. The absence of a material is often a ticket for one party to claim no contract exists and avoid performance. That can happen even with a preprinted contract is an important blank is left incomplete.

Years ago, courts required something of clear monetary value be exchanged as consideration to support a contract. Courts have relaxed the definition of consideration to include virtually any change in position by one party or the other. Someone trying to avoid a contract is now hard-pressed to claim the contract is not supported by consideration.

The law would be harsh indeed if it required proving existence of a contract to get paid when services or products have been supplied and the supplier could not prove agreement with the recipient. In those situations, the law relies on a legal fiction to create a contract or quasi contract and an obligation to pay. A party seeking to recover in the absence of an explicit agreement might still be successful under legal action for an implied contract or unjust enrichment.

One can create an obligation to pay under the theory of quantum meruit. Quantum meruit is an action to recover the reasonable value of services or products provided to another with contract implied in-fact. A contract implied in- fact is created when one party performs another’s request but there is not in agreement on all essential terms. Implied in-fact contracts can also be created when one person performs and the other understands that compensation is to be paid for that performance. The law creates an implied contract and obligation to pay.

The essential element of an action in quantum meruit is that services or materials were provided under circumstances where the parties understood that there would be an obligation to pay. The translation for quantum meruit is loosely “as much as one deserves.” The parties then argue over the reasonable value of whatever was provided, which often requires expert testimony. This legal theory can be used when the parties intended to create an actual contract but their express contract was defective or unenforceable. Recovery is based on the reasonable value of the services or materials provided. That might not be what their attempted express contract stated, but if there is payment specified in their contract that failed, that amount is usually the maximum that will be awarded.

Unjust enrichment may also provide recovery when there is no express contract between the parties. Unjust enrichment creates a contract implied in-law as opposed to one implied in-fact. It is a legal fiction and does not depend on an implied agreement between the parties. Instead, it focuses on situations where allowing one party to benefit at the expense of another would be unjust. Usually, the benefited party is aware that services or materials are being or have been provided.

One example of a case in which unjust enrichment would likely provide for recovery is where a painter paints the wrong house and the owner does not object. The elements of the claim for unjust enrichment are that one party has benefited the defendant, the defendant has knowledge of the benefit, the defendant accepts and retains the benefit and the circumstances make it unjust for the defendant to keep the benefit without paying for it.

If quantum meruit and unjust enrichment, sound the same to you, do not feel confused. Judges and lawyers throughout Florida intermingle the causes of action in both pleadings and decisions and many do not care about the difference. Bottom line is that those cases all seek to provide recovery to someone he knew has failed to create an effective contract.

Many of the cases involving quantum meruit and unjust enrichment arise from situations when the parties wrote their own contract. Others arise because the parties did not even try to write a contract. Almost all could have avoided court action if the parties had taken the time to prepare a written agreement incorporating all essential terms. Defective written agreements might have been corrected at the start if one or both parties had retained an experienced attorney.

In contract situations, the parties are well advised to give a lot of attention to drafting a written agreement. A well drafted agreement can avoid later dispute.

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