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**What arguments will Betty likely make to support her claim, what arguments will Sam likely make in response, and who is likely to prevail?**

**Applicable Law**

The common law governs all contracts for services. The UCC governs contracts for the sale of goods. If a contract involves services and goods whichever terms predominate will indicated if the common law is to be applied or the UCC.

Here, the contract will be governed by the UCC because Sam and Betty entered into a contract for the sale of a violin which is movable tangible good.

Thus, the contract will be governed by the UCC and UCC principles will apply.

**Contract Formation**

A valid contract requires offer, acceptance, consideration and no defenses.

Here, there is a possibility of a valid contract between Sam and Betty because Sam telephoned Betty to communicate an offer to her which Betty accepted. Furthermore, there is valid consideration because Sam forego a unique good, a violin made by Enrico Rocca from the early nineteenth century, which Betty paid \$200,000 for. However, there are defenses to contract formation and a breach of contract because Sam and Betty have placed different meanings and terms to the contract which will indicate if there was a valid contract between the parties that can indicate their remedies and rights.

Thus, there is not a valid contract between Sam and Betty.

**UCC 2-207 (Defense to Formation)**

Under UCC 2-207, battle of the forms, if both parties are merchants engaged in the course of dealing they may additional terms to a contract if it does not materially change the terms of the contract and the other party does not reject in a reasonable amount of time.

Here, Sam will argue that under UCC 2-207 both parties had a valid contract that should indicate their course of dealing pertaining to the violin. Both parties are merchants because they Sam is a well-known dealer in valuable musical instruments and Betty purchased stringed instruments from Sam for her high-end music store. Sam will argue that the contract between both parties is sufficient to indicate the terms they agreed on because Betty did not reject to the terms in a reasonable amount of time. However, Betty will argue that the additional terms that Sam added to the contract materially changed the terms the spoke about over the phone because initially they spoke about the uniqueness of the violin and the price Sam would sell it for but on the contract Sam added in that the violin was "sold as is, without warranty of any kind, express or implied." These terms materially changed the contract because they waived any right Betty would have to warranties when she spent over \$200,000 on a violin that is only worth \$5,000. As well as the terms that stated: "This written contract contains the entire agreement between the parties and supersedes any and all prior written and/or oral arguments." Sam will state that Betty promptly returned the contract and should have carefully read it over but this

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argument will likely not stand because Betty and Sam regularly engaged in the purchase and sale of musical instruments and she did not think that Sam will add additional terms that have not been added before. Therefore, the warranties and merger clause will not come in.

Thus, UCC 2-207 will not be a defense to contract formation for Sam.

### **Statute of Frauds (Defense to Formation)**

Under the statute of frauds, certain contracts must be in writing such as marriage contracts, suretyships, executor, sale of goods over \$500, and land sale contracts. Certain exceptions apply to the statute of fraud such as part performance for land sale contracts or a merchant's confirmatory memo that has the goods listed, the price, and their signature.

Here, the statute of frauds applies to the contract for the violin because as stated above it is a violin that is worth over \$200,000 (according to Sam) or \$5,000 (according to the expert appraiser). Sam will argue that the contract is valid under the statute of frauds and Betty may not use their phone conversation to show that it was the final indication of their contracting terms because the contract stated that "Seller agrees to sell and Buyer agrees to buy the following product: violin for the purchase price of: \$200,000." These terms fully state the conversation between Sam and Betty as well as listing the good and the purchase price for it. Furthermore, the contract is valid because Sam and Betty signed it as well as dating it.

Thus, under the statute of frauds the contract is valid between Sam and Betty.

### **Parole Evidence Rule (Defense to Formation)**

Under the parole evidence rule, if a contract is fully integrated with a merger clause then any previous oral conversation is not permitted to give meaning to the contract. However, if a contract is partially integrated then previous oral conversations may come in or if a fully integrated contract that has ambiguous terms, conditions, the course of dealing between the parties, and industry standards that would give meaning to the contract are permitted to be brought in.

Here, Betty will argue that Sam and Betty's conversation over the phone should be the ruling terms of the contract between them that does not include the waiver of an express or implied warranty because it gives meaning to ambiguous terms. However, Sam will argue that this argument will likely not stand because there are no ambiguous terms the contract clearly states that: "Seller agrees to sell and Buyer agrees to buy the following product: violin for the purchase price of: \$200,000." which memorializes the conversation both of them had over the phone. Additionally, Sam will argue that although the terms pertaining to the waiver of warranties and the term indicating that: "This written contract contains the entire agreement between the parties and supersedes any and all prior written and/or oral arguments (a merger clause)" are additional terms they are not conditions, ambiguous terms, terms indicating the course of dealing between the parties, or industry standards and for those reasons the parole evidence rule is not a defense to formation for Betty.

Thus, the parole evidence rule will not be a defense to contract formation for Betty.

### **Perfect Tender Rule (Breach of Contract)**

Under the UCC, the perfect tender rule applies to a breach of contract pertaining to goods. The

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goods must conform to the terms in a contract between two merchants, however, if it is a requirements contract and a merchant does supply a perfect delivery of goods but sends substitute goods with the assurance that the issue can be remedied before the time of performance arrives then the non-breaching party must give the other party a chance to cure the defect.

Here, Betty will bring a breach of contract action under the perfect tender rule because as indicated in Sam and Betty's phone conversation as well as their contract Sam was supposed to supply Betty with a violin worth \$200,000, however, the real value of the violin is only \$5,000. Sam might attempt to argue that this does not indicate a breach of contract because he sincerely believed the violin to be a genuine Rocca that was worth \$200,000. This argument will likely not stand because Betty will counter-argue that because Sam is such a well-known dealer in valuable musical instruments he had a duty to appraise the violin himself before he put it on the market.

Thus, Betty may recover under the perfect tender rule.

### **Unilateral Mistake**

Unilateral mistake affords a plaintiff the remedy of rescission if they had no reason to know of the mistake and they did not indicate that they would bear the burden of the mistake.

Here, Sam committed a unilateral mistake because he sincerely believed that the violin was worth \$200,000 when in reality it was only worth \$5,000 and was not a genuine Rocca. Betty will be entitled to the remedy of rescission because she had no reason to know of the mistake until a week after contracting with Sam and sending off the purchase price of the violin. Betty also never indicated that she would bear the burden of the mistake because additional terms that materially changed the contract were added in that subjected her to waive the warranties and any previous conversations she had with Sam - which she never agreed to.

Thus, a unilateral mistake was committed by Sam that will afford Betty the remedy of rescission.

### **Express Warranty and Implied Warranty for Fitness for a Particular Purpose**

An express warranty is one that clearly and univocally states that a good may be used for a particular purpose, it is guaranteed to conform to the terms of the contract, and it may never be waived. An implied warranty for fitness for a particular purpose also may never be waived.

Here, Sam committed a breach because he added an additional term that waived an express warranty which would afford Betty the right to recover. Furthermore, this warranty would dominate the terms pertaining to the fact that the violin is worth \$200,000 because it clearly states that in the binding contract between the parties. Additionally, the waiver of the implied warranty may not come in because it is never to be waived.

Thus, a waiver of the express warranty and implied warranty will not come in.

### **Misrepresentation**

Misrepresentation occurs when a party fraudulently induced reliance upon another party to material terms of a contract and the other party relied on it to their detriment.

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Here, Betty will argue that Sam misrepresented the terms of the contract because he stated that the value of the violin was higher than it actually was and that it was an antique. Betty also relied on Sam's terms to her detriment because she quickly tendered him the purchase price of the contract. Sam will argue that he did not misrepresent the terms through fraud because he sincerely believed the violin was worth that much but this argument will likely not stand because even without fraud there was misrepresentation of the terms of the contract.

Thus, Sam misrepresented the terms of the contract.

### **Rescission**

Rescission is the unmaking of a contract after a party engaged in fraudulent conduct or misrepresented the terms of the contract.

Here, Betty is entitled to rescission because Sam misrepresented the terms of the contract.

Thus, Betty will recover under rescission.

### **Expectation Damages**

Expectation damages put the non-breaching party in the same position they would be in if not for the breach. To recover the plaintiff must prove: 1) clear and certain terms, 2) no adequate legal remedy, 3) damages were foreseeable, and 4) damages were unavoidable.

Here, Betty will argue for expectation damages because she paid \$200,000 for the contract price of violin. Betty will indicate that the contract terms were clear and certain but this argument will not stand because there were additional terms that are not to be part of the contract. Additionally, Betty can recover for a legal remedy, rescission, so she does have an adequate legal remedy. It would also be difficult for Betty to prove that the damages were foreseeable and unavoidable because at the time of contract both parties did not know that the violin was a replica worth only \$5,000.

Thus, Betty will not be able to recover under expectation damages.

### **Overall Conclusion**

For these reasons, the additional terms of the contract will not come in due to UCC 2-207 and Betty can recover the purchase price of the violin for \$200,000 under the remedy of rescission.

**END OF EXAM**