

Who Breached First, and Was It Material?

BY LOGAN ADCOCK

The Texas Supreme Court issued its seminal opinion on the “prior material breach” rule in *Mustang v. Driver Pipeline* in 2004. Simply put, “when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance.” Application of the rule is far from simple, though, and contracting parties have struggled with the practical and legal effects of withholding further performance in the wake of a breach by the other party. While determining who breached first is a relatively easy task for the finder of fact, determining whether that breach was material – and, depending on that answer, the allocation of damages – is much more difficult. The Supreme Court took another look at the rule in its 2017 opinion, *Bartush v. Cimco*, to correct misconceptions of the rule and clarify its application and effect.

In *Bartush*, the owner of a food-product manufacturing plant engaged a contractor to install a new refrigeration system. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432 (Tex. 2017). After installation, the new system failed. When resolution attempts broke down, the plant owner withheld the remaining amount owed under the contract—about \$113,000. The contractor sued to recover the balance, and the owner counterclaimed, seeking among other things, the costs associated with repairing the system.

The jury found that both parties breached the contract, and that the contractor breached first. Although

the jury also found that the owner’s failure to pay the remaining contract balance was not excused, the trial court rendered judgment for the owner and awarded nothing to the contractor. The contractor appealed.

The appellate court reversed and remanded to the trial court for entry of judgment that the owner take nothing and that the contractor recover the remaining contract balance. According to the appellate court, the jury’s finding that the owner was not excused from paying the contractor necessarily implied that the contractor’s breach was not material. The court then went a step further in holding that the owner’s failure to pay was a material breach which, under the prior material breach rule, excused the contractor’s breach.

The owner then appealed to the Supreme Court, which held that, while both the trial court and the appellate court attempted to render judgment in accordance with the jury’s verdict, neither court did so. It was clear that, thirteen years after *Mustang v. Driver*, contracting parties, attorneys, and even courts remained confused as to the application of the prior material breach rule. The Supreme Court took the opportunity to restate and clarify the rule’s application and effect.

First, in examining the contractor’s prior breach, the Court reiterated that the breach must be material to excuse further performance. By contrast, when a party commits a nonmaterial breach, the other party is not excused from future performance but may sue for the damages caused by the breach. In *Bartush*, the jury expressly found that the owner’s failure to pay was not

excused; therefore, the contractor’s breach was not material.

Second, in examining the owner’s subsequent breach, the Court held that, while a party’s nonmaterial breach does not excuse the further performance by the other party, neither does the second, material breach excuse the first. In other words, the Court clarified that a material breach excuses *further* performance, not *past* performance. The appellate court “turned the doctrine on its head” in holding that the owner’s material breach of nonpayment retroactively excused the contractor’s prior breach.

Having corrected the lower courts’ errors and better explained the application of the prior material breach rule, the Supreme Court then addressed the allocation of damages where both parties breached the contract. Because the contractor’s prior breach was nonmaterial, the owner was still obligated to pay the remaining contract balance.

On the other hand, the owner’s failure to pay, though material, did not retroactively excuse the contractor’s prior performance failures. Thus, while the owner remained liable for its breach of contract, it was entitled to offset the amount owed to the contractor by the costs associated with correcting the contractor’s improper work.

While simple in theory, the prior material breach rule has proven difficult to apply for contracting parties, attorneys, and Texas courts alike. In *Bartush* the Supreme Court certainly provided additional guidance in dealing with competing breach claims; however, non-breaching parties still face a complicated and fact-intensive analysis in determining whether that prior breach excuses further performance. **HN**



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