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A review of the county assessor's testimony shows a reasonable basis for the differences between the county's valuation and Sangree's appraisals. We further question Sangree's appraisals to the extent that the appraisals showed a substantial difference in 2009 and 2010 between the income and cost methods. It was only after deductions in those respective amounts were made for external depreciation that the income and cost approaches were equal to each other. These large deductions are suspect under the record in this case.

JQH is correct insofar as TERC erred when it found that JQH had not rebutted the presumption of validity of the county's valuation. Nevertheless, TERC did not err in affirming the valuation of the property, because JQH failed to meet its burden of showing that the county's valuation was unreasonable and arbitrary. TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. JQH's assignment of error to the contrary is without merit.

CONCLUSION

The decisions of TERC are affirmed.

AFFIRMED.

CASSEL, J., not participating.

TURBINES LTD., APPELLEE, V. TRANSUPPORT, INCORPORATED, APPELLANT.

825 N.W.2d 767

Filed February 1, 2013. No. S-11-042.

1. **Default Judgments: Appeal and Error.** In an appeal from the entry of a default judgment, or the denial of a motion to stay entry of a default judgment, an appellate court will affirm the action of the trial court in the absence of an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Actions: Default Judgments: Complaints: Damages: Proof.** Where a defendant is in default, the allegations of the complaint are to be taken as true against him,

except allegations of value and amount of damage. Thus, if the complaint states a cause of action, the plaintiff is entitled to judgment without further proof. The necessary corollary of this rule is that if the allegations in the complaint fail to state a cause of action, the plaintiff is not entitled to default judgment.

4. **Actions: Default Judgments: Evidence: Appeal and Error.** In determining whether a district court's entry of a default judgment is so clearly untenable as to constitute an abuse of discretion, an appellate court should assume the truth of all material facts alleged in the complaint and of any evidence offered by the plaintiff. It must then decide whether the plaintiff has established a valid cause of action.
5. **Contracts: Rescission.** Generally, grounds for cancellation or rescission of a contract include fraud, duress, unilateral or mutual mistake, and inadequacy of consideration.
6. ____: ____. Neither the doctrine of discharge by supervening frustration as set forth in Restatement (Second) of Contracts § 265 (1981) nor the doctrine of discharge by supervening impracticability under Restatement (Second) of Contracts § 261 (1981) can serve as the basis for rescission of a contract that has been fully performed.
7. ____: ____. Performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused. And the failure to perform a promise, the performance of which is a condition, entitles the other party to the contract to a rescission thereof.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges, on appeal thereto from the District Court for Cuming County, ROBERT B. ENSZ, Judge. Judgment of Court of Appeals affirmed.

Thomas B. Donner for appellant.

Denise E. Frost and Clarence E. Mock, of Johnson & Mock, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

Turbines Ltd. (Turbines), a Nebraska corporation, purchased a replacement part for a helicopter engine from Transupport, Incorporated, a New Hampshire corporation, intending to use the part to fill an order Turbines had received from a customer in Singapore to be shipped to Malaysia. When Turbines learned that filling the order could subject it to criminal liability under federal law, Turbines attempted to return the part to Transupport

and obtain a refund of the $30,000 purchase price. Transupport refused to refund the payment, and Turbines brought this action in the district court for Cuming County, seeking rescission of the purchase order. Although served with summons and notice of the proceedings, Transupport failed to appear at both a pretrial conference and the trial. After receiving evidence, the district court entered judgment in favor of Turbines. Eight days later, Transupport appeared through counsel and filed motions for new trial and to vacate the judgment. The district court overruled those motions, and Transupport appealed. The Nebraska Court of Appeals determined that the district court did not err in overruling the posttrial motions. But the Court of Appeals reversed the default judgment against Transupport and ordered that Turbines' complaint be dismissed, reasoning the evidence adduced at trial did not support rescission as a matter of law.[1] We granted Turbines' petition for further review and now affirm the judgment of the Court of Appeals.

BACKGROUND

FACTS

Turbines, owned by Marvin Kottman, is in the business of helicopter sales and support. Sometime in late 2006 or early 2007, Monarch Aviation (Monarch) contacted Turbines' office in Singapore seeking to purchase a turbine nozzle. Turbines did not have the nozzle in its inventory, so it approached Transupport, a turbine engine parts supplier with which it had done business since the mid-1980's. Turbines told Transupport that it wanted the nozzle for a customer in Singapore, whom it did not otherwise identify, and e-mail correspondence between Transupport and Turbines reflects a discussion about the customer's requests and requirements. Kottman testified that the customer referred to in the e-mails was Monarch and that Transupport was aware of Turbines' plans to ship the nozzle to Malaysia.

Turbines purchased the nozzle from Transupport for $30,000 and tendered payment with the purchase order. Under

[1] *Turbines Ltd. v. Transupport, Inc.*, 19 Neb. App. 485, 808 N.W.2d 643 (2012).

the "Remarks" section, the purchase order states, "Subject to Inspection and acceptance by customer." Kottman testified he inserted this language to document that he had explained to Transupport that he had no use for the nozzle and that if it was unacceptable to his customer, he would return the nozzle to Transupport. But additional text on the purchase order stated: "Turbines . . . is Transupport's customer, acceptance/rejection is always at customer." Kottman testified that this notation was not on the purchase order when it was sent to Transupport.

Transupport shipped the nozzle to Turbines with an accompanying invoice showing that the purchase price had been prepaid. The invoice stated that Transupport was not the "USPPI" for the item. Kottman explained that USPPI is a customs term for U.S. principal party of interest; a USPPI is required for all exports of goods. Boilerplate language at the bottom of the invoice states that the sale may include munitions list items or commerce-controlled list items and indicates that a license may be required for export. The back of the invoice includes Transupport's return policy: "**NO** RETURNS WITH OUT [sic] PRIOR AUTHORIZATION. **NO** RETURNS AFTER 90 DAYS." Kottman testified that he never agreed to this return policy.

Turbines attempted to ship the nozzle to Malaysia as directed by Monarch. The nozzle was seized in February 2007 by U.S. Customs and Border Protection (U.S. Customs), which claimed that a license from the U.S. Department of State was required to ship the nozzle overseas. After several appeals, it was determined that no license was required, and the nozzle was returned to Turbines sometime after January 2009. Turbines kept Transupport informed of the status of the nozzle during the contested seizure by U.S. Customs.

During the time that U.S. Customs retained the nozzle, Turbines learned that Monarch was redirecting goods to Iran, a prohibited destination, and that a person associated with Monarch had become the subject of a federal indictment. The indictment was unsealed in August 2007, 6 months after the parties' transaction was completed. Under federal law, if Turbines shipped the nozzle to Monarch after learning this

information, it was subject to criminal penalties. Thus, after receiving the nozzle from U.S. Customs, Turbines returned it to Transupport and requested that the purchase price be refunded. Transupport refused to do so and eventually shipped the nozzle back to Turbines' counsel.

Procedural History

In March 2010, Turbines filed its complaint seeking to compel Transupport to refund the $30,000 purchase price, based upon the purchase order language, "Subject to Inspection and acceptance by customer." William Foote, Transupport's registered agent and vice president, was personally served with the complaint on March 16, but Transupport did not answer or otherwise respond to the complaint within 30 days. On May 4, Turbines filed a motion for default judgment, and a hearing was set for June 3.

On June 2, 2010, the clerk of the district court received a letter from Transupport signed by Foote. The letter responded to the allegations of the complaint and requested dismissal of the action. On June 3, the court, on its own motion, entered a pretrial progression order. It ordered that all discovery be completed before an August 5 pretrial conference. It further ordered that the pretrial conference "shall be attended by the attorney that will act as lead counsel at the time of trial." On June 28, Turbines filed a motion to compel Transupport's compliance with certain discovery requests, and a hearing on that motion was set for the same date as the pretrial conference.

Transupport failed to appear at the August 5, 2010, pretrial conference. In an order entered the same day, the court extended the deadline for discovery to November 1 and set trial for November 29. On November 22, Turbines moved to strike Foote's letter purporting to answer the complaint, arguing it was signed by a person not licensed to practice law in Nebraska. Turbines also moved for default judgment. A hearing on these motions was set for the same day as trial.

Transupport did not appear for trial on November 29, 2010. Turbines presented evidence in support of its claim. After receiving this evidence, the court orally sustained Turbines' motion to strike Foote's letter, reasoning that Foote was not a

lawyer licensed to practice in the State of Nebraska and therefore could not represent Transupport, a corporate entity. The court then stated, "So this can then proceed as a motion for default judgment," but explained that "whether I treat it as a motion for default judgment or a trial on the merits makes no difference at this point because the evidence is only in support of the complaint because the defendant has chosen not to appear in any capacity to respond to the evidence."

The court then reviewed the evidence presented by Turbines and found it clearly showed that the "customer" referenced in the purchase order was the party to whom Turbines would provide the nozzle. The court found that because the transaction was never completed to satisfy this customer, the terms of the contract were not met and it could exercise its equitable jurisdiction to grant rescission of the contract. The court ordered Transupport to return the purchase price to Turbines upon the return of the nozzle. Transupport was also ordered to pay the costs of the proceeding. The district court's judgment memorializing these rulings was entered on December 7, 2010.

On December 15, 2010, a licensed Nebraska attorney entered an appearance for Transupport and filed several motions, including motions for new trial and to vacate judgment. The motion for new trial alleged seven different grounds, each of which is a ground listed in Neb. Rev. Stat. § 25-2001 (Reissue 2008), the statute authorizing district courts to vacate or modify judgments. The motion to vacate judgment set forth the same seven grounds and added that Transupport had a meritorious defense and that vacating the judgment was necessary for the proper and just determination of the action. In conjunction with these motions, Transupport's attorney filed an affidavit which averred that he was first contacted by Foote on December 13.

A hearing was held on December 21, 2010. Transupport introduced three affidavits, including one from Foote stating that he received the motions to strike answer and for default judgment on November 24, but that he was out of the office for Thanksgiving and his wife's heart surgery from 5 p.m. on November 24 to 4 p.m. on December 1. The affidavits were

received in support of Transupport's motion to vacate judgment. In addition, Transupport's counsel argued that it should be given an opportunity to present its meritorious defense. Counsel argued that rescission required proof of fraud, undue influence, misrepresentation, or business coercion and that the affidavits showed that none of those had occurred.

In an order denying both of Transupport's motions, the district court found that Transupport failed to satisfy any of the statutory grounds in § 25-2001 for vacating a judgment. The court also determined that the motion for new trial was nonmeritorious because it did not set forth any ground listed in Neb. Rev. Stat. § 25-1142 (Reissue 2008), the new trial statute.

Court of Appeals' Opinion

Transupport appealed, and assigned and argued to the Court of Appeals that the district court erred in (1) striking its answer, (2) overruling its motion to vacate judgment and motion for new trial, and (3) determining Turbines was entitled to rescission. The Court of Appeals determined that the district court did not err in striking Transupport's purported answer, reasoning Foote was not a member of the Nebraska Bar and therefore his letter was a nullity.[2] The Court of Appeals determined the district court did not abuse its discretion in overruling Transupport's motion to vacate judgment, reasoning Transupport failed to protect its own interests by ignoring the district court's orders and failing to appear for trial. The Court of Appeals also upheld the district court's ruling on Transupport's motion for new trial, determining that the motion did not set out any statutory grounds for a new trial as specified in § 25-1142, but instead alleged statutory grounds for a motion to vacate.

But ultimately, the Court of Appeals found Transupport was entitled to relief because the evidence did not support rescission of the contract. It found that Neb. U.C.C. § 2-615 (Reissue 2001) did not support rescission, because that section excuses a seller from timely delivering goods,

[2] *Id.*

and Transupport had delivered the nozzle. The court also found the doctrine of supervening frustration did not support rescission, because it was "impossible to say that a 'basic assumption' of the contract was Turbines' ability to export the nozzle to Monarch."[3] Lastly, the Court of Appeals concluded that a unilateral mistake did not permit rescission, reasoning that enforcement of the contract would not be unconscionable. Turbines timely filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

Turbines assigns, restated and summarized, that the Court of Appeals erred in reversing the district court's order rescinding the contract and in holding the evidence was insufficient to support rescission.

In a response to the petition for further review, Transupport assigns that the Court of Appeals erred in finding the district court properly struck "the Answer" and properly disposed of its posttrial motions. But these issues were not raised in a timely manner. The Court of Appeals' opinion was filed on January 24, 2012. Our rules provide that "a petition for further review and memorandum brief in support must be filed within 30 days after the release of the opinion of the Court of Appeals."[4] Because Transupport's response was not filed within the 30-day time period,[5] Transupport's assignments of error are not properly before the court, and we do not address them.

STANDARD OF REVIEW

[1,2] In an appeal from the entry of a default judgment, or the denial of a motion to stay entry of a default judgment, an appellate court will affirm the action of the trial court in the absence of an abuse of discretion.[6] A judicial abuse of

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[3] *Id.* at 501, 808 N.W.2d at 655.

[4] Neb. Ct. R. App. P. § 2-102(F)(1) (rev. 2012).

[5] See, *id.*; *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999).

[6] *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999).

discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[7]

ANALYSIS

We begin by addressing Turbines' argument that once the Court of Appeals determined that the district court did not err in refusing to vacate the judgment, it should have affirmed without reaching the merits of the rescission claim. This requires us to determine on what grounds a default judgment may be challenged.

[3] The general rule is that "where a defendant is in default, the allegations of the [complaint] are to be taken as true against him, except allegations of value and amount of damage."[8] Thus, if the complaint states a cause of action, the plaintiff is entitled to judgment without further proof.[9] The necessary corollary of this rule is that if the allegations in the complaint fail to state a cause of action, the plaintiff is not entitled to default judgment. While this rule developed under Nebraska's former code pleading system, we perceive no reason why it should not be applied under our current notice pleading regime.

Here, Turbines did not rely solely on its pleading, but also offered evidence in support of its motion for default judgment. Both the district court and the Court of Appeals considered that evidence when determining whether the judgment in favor of Turbines was proper. We conclude that they did not err in doing so, because a party seeking default judgment may present evidence in support of its claim.

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[7] *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012); *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

[8] *State of Florida v. Countrywide Truck Ins. Agency, supra* note 6, 258 Neb. at 124, 602 N.W.2d at 438 (emphasis omitted). Accord *Weir v. Woodruff*, 107 Neb. 585, 186 N.W. 988 (1922).

[9] *Weir v. Woodruff, supra* note 8; *State on behalf of Yankton v. Cummings*, 2 Neb. App. 820, 515 N.W.2d 680 (1994).

[4] The foregoing demonstrates that in determining whether a district court's entry of a default judgment is so "clearly untenable" as to constitute an abuse of discretion, an appellate court should assume the truth of all material facts alleged in the complaint and of any evidence offered by the plaintiff. It must then decide whether the plaintiff has established a valid cause of action. Here, the Court of Appeals essentially concluded that Turbines was not entitled to rescission as a matter of law because the allegations of its complaint and the evidence it presented failed to state a cause of action. We now review that determination.

[5] Generally, grounds for cancellation or rescission of a contract include fraud, duress, unilateral or mutual mistake, and inadequacy of consideration.[10] Turbines' complaint does not identify any specific legal grounds for rescission and does not include any allegations of fraud or duress on the part of Transupport. In its brief filed in the Court of Appeals, Turbines relied on § 2-615 and "common law contractual principles related to supervening impracticability" as its legal grounds for rescission.[11] The Court of Appeals examined the record and concluded that the pleadings and evidence did not provide a legal basis for rescission under § 2-615, the doctrines of supervening impracticability or supervening frustration, or unilateral mistake. On further review, Turbines argues that the Court of Appeals erred in its analysis of these theories and failed to consider others.

Uniform Commercial Code § 2-615

Section 2-615 provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
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> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and

[10] See *Eliker v. Chief Indus.*, 243 Neb. 275, 498 N.W.2d 564 (1993).

[11] Brief for appellee at 20.

> (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Comment 1 to § 2-615 states that it "excuses a seller from timely delivery of goods contracted for, where his or her performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting." The Court of Appeals reasoned that § 2-615 was inapplicable because there was no failure on the part of the seller, Transupport, to deliver the nozzle to Turbines.

Relying upon comment 9 to § 2-615, which states that under certain circumstances, it "may well apply" to the performance of a buyer under a "requirements" or "supply" contract, Turbines argues that it applies here. But this case does not involve such a contract. More important, it is not an action for breach of contract. Section 2-615 specifies circumstances under which nonperformance or delayed performance of a sales contract will not constitute a breach. Here, there is no issue of breach, because the contract was fully performed by each party in that Transupport shipped the nozzle to Turbines and Turbines remitted the purchase price to Transupport. We agree with the Court of Appeals that § 2-615 does not provide a legal basis for rescission on the facts presented here.

SUPERVENING IMPRACTICALITY AND FRUSTRATION

In *Cleasby v. Leo A. Daly Co.*,[12] we determined that business necessity justified an international architectural consulting firm's termination of a project manager's assignment at an overseas jobsite when an illness caused the manager's prolonged absence from the country where the work was being performed. In reaching this conclusion, we relied in part upon Restatement (Second) of Contracts §§ 261 and 265.[13] Section 261, entitled "Discharge by Supervening Impracticability," provides:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[14]

Section 265, entitled "Discharge by Supervening Frustration," provides:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.[15]

The Court of Appeals concluded that § 265 could not provide a legal basis for rescission because it was "impossible to say that a 'basic assumption' of the contract was Turbines' ability to export the nozzle to Monarch."[16] But we believe that there is a more basic question of law, namely, whether the doctrine of supervening frustration can serve as the basis for rescinding a

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[12] *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 376 N.W.2d 312 (1985).

[13] Restatement (Second) of Contracts §§ 261 and 265 (1981).

[14] *Id.*, § 261 at 313.

[15] *Id.*, § 265 at 334-35.

[16] *Turbines Ltd. v. Transupport, Inc., supra* note 1, 19 Neb. App. at 501, 808 N.W.2d at 655.

contract that has been fully performed. In *Kunkel Auto Supply Co. v. Leach*,[17] the buyer purchased automotive equipment from the seller and gave a promissory note in payment. Both parties believed that the equipment would allow the buyer to operate a state testing station under a statute which they understood to require mandatory vehicle testing. That understanding was incorrect, and the statute was eventually repealed. When sued on the note, the buyer alleged that it was void under various theories, including the doctrine of commercial frustration derived in part from a previous version of the Restatement of Contracts on which § 265 is based.[18] We held as a matter of law that this defense was not viable because the contract, so far as the seller was concerned, was fully performed before the defense arose. We noted that the doctrine of commercial frustration "applies to executory contracts alone."[19]

In *Mobile Home Estates v. Levitt Mobile Home*,[20] the Arizona Supreme Court relied in part on our decision in *Kunkel Auto Supply Co.* in holding that the doctrine of commercial frustration could not be utilized as a basis for rescinding a fully performed contract. In that case, a mobile home dealer purchased and paid for several modular duplex dwelling units with the intention of reselling them. Resale proved difficult if not impossible because the units did not comply with subsequently adopted standards. The purchaser sought rescission of the contract and recovery of the purchase price under the Arizona doctrine of "commercial frustration," which provided that "'"when, due to circumstances beyond the control of the parties the performance of a contract is rendered impossible, the party failing to perform is exonerated." . . .'"[21] Citing

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[17] *Kunkel Auto Supply Co. v. Leech*, 139 Neb. 516, 298 N.W. 150 (1941).

[18] See, Restatement of Contracts § 288 (1932); Restatement (Second), *supra* note 13, § 265, Reporter's Note.

[19] *Kunkel Auto Supply Co. v. Leech, supra* note 17, 139 Neb. at 522, 298 N.W. at 153.

[20] *Mobile Home Estates v. Levitt Mobile Home*, 118 Ariz. 219, 575 P.2d 1245 (1978).

[21] *Id.* at 222, 575 P.2d at 1248, quoting *Garner v. Ellingson*, 18 Ariz. App. 181, 501 P.2d 22 (1972).

Kunkel Auto Supply Co. and other authorities, the court concluded: "It would be contrary to logic and common sense to hold that a contract was rendered impossible to perform when, in fact, it had already been performed."[22]

[6] We find this analysis applicable to § 265 of the Restatement, which clearly contemplates an executory contract by providing that a party's "remaining duties to render performance are discharged" by the occurrence of an event which substantially frustrates the party's principal purpose. Each of the illustrations which follow the statement of the rule involve circumstances where a party's obligation to perform an executory contract is discharged by the occurrence of an event which frustrates that party's purpose in entering into the contract.[23] We therefore conclude as a matter of law that the doctrine of discharge by supervening frustration as set forth in § 265 of the Restatement cannot serve as the basis for rescission of a contract that has been fully performed. And although the Court of Appeals did not specifically discuss the doctrine of discharge by supervening impracticability under § 261 of the Restatement, we conclude that the same reasoning applies. Like § 265, § 261 defines circumstances under which a party's obligation to perform a contract may be discharged. Neither contemplates the circumstances of this case, in which the contract was fully performed.

Failure to Agree on Material Terms

Turbines asserts that the district court properly granted rescission on the ground that the parties failed to agree on a material term of the contract and that the Court of Appeals improperly ignored this basis for the district court's judgment. Turbines relies upon the following statement by the district court to show that the court made that finding: "But it appears from the evidence that there was probably some disagreement, and the Court finds such as to the complete elements of the transaction which was never completed to satisfy the terms of

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[22] *Id.*

[23] Restatement (Second), *supra* note 13, § 265.

the contract . . . .” Immediately before making this statement, the court noted that while there may have been some confusion among the parties as to what was meant by “customer,” the evidence showed the parties understood that the customer was someone other than the two of them. Thus, Turbines is arguing that because the district court acknowledged the parties may have attached different meanings to the term “customer,” the parties failed to agree on a material term of the contract, and that rescission was properly granted.

Turbines relies upon *Sayer v. Bowley*[24] in support of its argument. *Sayer* involved an oral contract for the sale of land in which the buyer sought specific performance. This court noted:

> Unlike the situation in a case involving contracts for the sale of goods, we will not read unsettled terms into contracts for the sale of land . . . . “The parties themselves must agree upon the material and necessary details of the bargain, and if any of these be omitted, or left obscure or indefinite, so as to leave the intention of the parties uncertain respecting the substantial terms, the case is not one for specific performance.”[25]

Even assuming this rule applies to the present transaction, it would not entitle Turbines to relief, because the record reflects that Turbines and Transupport agreed on all material and necessary details of the bargain. Transupport agreed to supply the nozzle, and Turbines agreed to pay $30,000 in exchange for it. According to Kottman, it was agreed that Turbines could return the nozzle, if the customer found the nozzle unacceptable. But as the Court of Appeals correctly determined, there was no allegation or evidence that the nozzle was unacceptable to either Turbines or Monarch.

Failure of Condition Precedent

[7] Turbines argues that it is entitled to rescission because the remark in the purchase order, “Subject to Inspection and

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[24] *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993).

[25] *Id.* at 807, 503 N.W.2d at 170-71, quoting *Reifenrath v. Hansen*, 190 Neb. 58, 206 N.W.2d 42 (1973).

acceptance by customer," conditioned its duty to perform. This court has recognized that performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused.[26] And the failure to perform a promise, the performance of which is a condition, entitles the other party to the contract to a rescission thereof.[27]

A case relied upon by Turbines provides a good example of the application of these principles. *Gallner v. Sweep Left, Inc*.[28] involved a contract for the purchase of stock which was to be placed in escrow at a specified bank. The contract explicitly made the company's duty to place the stock in escrow "subject to the payment of $1000."[29] This court concluded that because the $1,000 was never paid, the company's duty to perform by placing the stock in escrow never arose, and that it was entitled to rescind the contract.

Here, the purchase agreement is not explicit. The clause that Turbines relies upon appears in the "Remarks" section of the purchase order. There is no other language indicating that Turbines' duty to pay was subject to its customer's acceptance of the nozzle. Kottman testified that the language was added to reflect the parties' understanding that Turbines was allowed to return the nozzle if it was unacceptable to the customer. But Kottman also testified that he sent the purchase order along with the $30,000 purchase price. Because the $30,000 was prepaid, Turbines' duty to pay could not have been conditioned on acceptance and inspection by Monarch at some subsequent date. Thus, the doctrine of failure of a condition precedent does not support the district court's grant of rescission.

Supervening Prohibition or Prevention by Law

Turbines argues that it was entitled to rescission because of the legal difficulties it would have faced if it shipped the

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[26] *D & S Realty v. Markel Ins. Co*., 284 Neb. 1, 816 N.W.2d 1 (2012).

[27] *Gallner v. Sweep Left, Inc*., 203 Neb. 169, 277 N.W.2d 689 (1979).

[28] *Id*.

[29] *Id*. at 171, 277 N.W.2d at 690 (emphasis omitted).

nozzle to Monarch. It relies on two cases holding that a party's failure to perform a contract does not constitute a breach where performance is made unlawful by a governmental entity.[30] In both cases, a seller located in the United States successfully argued that it was excused from a contractual undertaking to ship goods to a buyer in Iran as a result of export restrictions imposed by the government of the United States. In each case, the courts held that intervening action of the government which would have made shipment unlawful excused the seller's nonperformance, so that its failure to ship the goods did not constitute a breach of the contract. Neither case provides support for rescinding a contract that has been fully performed, as is the case here.

Unilateral Mistake

Finally, the Court of Appeals reasoned that Turbines' arguably unilateral mistake regarding its ability to ship the nozzle to Monarch could not provide a basis for rescission, because enforcement of the contract as made would not be unconscionable, given Kottman's admission that there were other potential customers for the nozzle.[31] We agree.

CONCLUSION

Turbines fulfilled its contractual obligation to pay in advance for the nozzle which it ordered from Transupport. In turn, Transupport fulfilled its contractual obligation to ship the nozzle to Turbines. The contract did not contemplate the circumstances which subsequently prevented Turbines from shipping the nozzle to Monarch. But the occurrence of those circumstances did not constitute a basis for rescinding the fully performed contract. Thus, although Transupport clearly ignored the district court's orders and failed to appear for trial, the district court abused its discretion in entering default judgment in favor of Turbines, because the uncontroverted facts provide

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[30] See, *Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576 (2d Cir. 1993); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 591 F. Supp. 293 (E.D. Mo. 1984).

[31] *Turbines Ltd. v. Transupport, Inc., supra* note 1.

no legal basis for rescission, and to allow such a judgment to stand would be untenable. Accordingly, although our reasoning differs in some respects, we affirm the judgment of the Court of Appeals.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DAVID E. CORDING, RESPONDENT.

825 N.W.2d 792

Filed February 1, 2013. No. S-11-870.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
4. ____. Any violation of the Nebraska Rules of Professional Conduct constitutes grounds for discipline.
5. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances, and the Nebraska Supreme Court considers the attorney's acts underlying the events of the case and throughout the proceedings.
6. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
7. **Disciplinary Proceedings: Attorney and Client.** Among the major considerations in determining whether a lawyer should be disciplined is maintenance of the highest trust and confidence essential to the attorney client relationship.
8. **Disciplinary Proceedings.** The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.

Original action. Judgment of public reprimand.

John W. Steele, Assistant Counsel for Discipline, for relator.