



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 2, 2011

CBCA 2110

A TO Z WHOLESALE,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Zev Adler, Owner of A to Z Wholesale, Monsey, NY, appearing for Appellant.

Alexander Laytin, Office of Chief Counsel, Customs and Border Protection, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, A to Z Wholesale, has appealed a final decision issued a contracting officer of respondent, Department of Homeland Security, Customs and Border Protection, denying its claim for a refund with regard to merchandise, a violin and case, purchased at an auction held by respondent. Pursuant to Board Rule 8, respondent has filed a motion to dismiss for failure to state a claim upon which relief can be granted. We grant the motion, which we resolve as a motion for summary relief.

Factual Background

The violin which is the subject of the claim was sold at auction by respondent to appellant. The auction was held on July 16, 2009, by EG&G Technical Services (EG&G), with which respondent contracts to hold public auctions. Appeal File, Exhibit 2.

The violin was described in the auction catalog as “VIOLIN W/CASE. PETRO PALLOTTA, FECE LANNO 1797, PERUGIA.” Appeal File, Exhibit 1 at 8. According to EG&G, the phrase “PETRO PALLOTTA, FECE LANNO 1797, PERUGIA” was taken from the violin itself. Appeal File, Exhibit 5 at 2. Appellant states that this information appears on a label inside the violin. Appeal File, Exhibit 6 at 1.

The auction catalog (catalog) contained multiple provisions concerning warranties. The first provision was contained in a document in the catalog entitled “Sale of Government General Order Merchandise - General Sale Terms and Conditions”:

8. MERCHANDISE DESCRIPTIONS^[1]: The Government warrants to the original Purchaser that the merchandise listed in the sales catalog for bids will conform to its description. This warranty is in place of all other guaranties and warranties, express or implied. The Government does not warrant the condition, quality, or merchantability of the merchandise or its fitness for any use or purpose. The condition of items offered varies from “NEW to SALVAGE.” The Purchaser understands and agrees that all merchandise is purchased and accepted “AS IS, WHERE IS” and “WITH ALL FAULTS.”

The amount of recovery under this provision is limited to the purchase price of the inaccurately described merchandise. The Purchaser is not entitled to any payment for loss of profit or any other money damages, including special, direct, indirect, incidental, or consequential.

For Purchasers claiming recovery under the warranty of description, no refund will be made unless the Purchaser:

- a) submits a written notice to the Contractor^[2] within 30 calendar days of the date of removal that explains in what manner the merchandise was inaccurately described.

¹ This clause is referred to in this decision as the Merchandise Descriptions clause.

² Identified elsewhere in the document as EG&G.

- b) If the government agrees, then a full refund of the money received shall be returned.

If a misdescription is determined before removal of the merchandise, the Government will keep the merchandise and refund any money paid. If a misdescription is determined after removal, the Government will refund any money paid if the Purchaser takes the merchandise at his/her expense to a location specified by the Contractor. The purchaser must maintain the merchandise in the same condition as when removed.

Appeal File, Exhibit 1 at 12-13.

Another provision concerning warranties was contained in the catalog in a document entitled “Terms of Condition of Sale - Carteret, New Jersey, July 15-16, 2009.”

CONDITION & DESCRIPTION^[3] - The condition of the items being offered varies from “NEW” to “SALVAGE.” The buyer understands and agrees:

- (1) any description or sample of the merchandise given or furnished by EG&G is derived from records and documents that may be unverified as to accuracy, is solely for identification, and DOES NOT CREATE ANY WARRANTY, expressed or implied, that the merchandise actually conforms to such description or sample;
- (2) all weights, measurements, and DESCRIPTIONS must be considered approximations and DO NOT create any warranty (emphasis added);
- (3) that the merchandise is purchased and accepted by buyer “AS IS,” and “WITH ALL FAULTS.” EG&G MAKES NO WARRANTIES OR GUARANTEES WHATSOEVER WHETHER WRITTEN, ORAL, OR IMPLIED AS TO QUANTITY, CONDITION, USABILITY, SALABILITY, WEIGHTS, MEASUREMENTS, OR OTHER SPECIFICATIONS.

Appeal File, Exhibit 1 at 9.

The catalog contained a Bidder’s Checklist, which stated in relevant part:

³ This clause is referred to in this decision as the Condition and Description clause.

Have you Inspected the Merchandise? Caution: do not bid on anything you haven't viewed. All items are sold "as is, where is," and ALL SALES ARE FINAL.

Have you read the Terms of Sale? These are the rules that govern each sale and provide you with information about completing your purchase.

Appeal File, Exhibit 1 at 3.

The catalog contained the following on a page entitled "Bidder Information":

Q: Why Inspect:

A: EG&G Technical Services provides a brief description of the merchandise offered for sale. This description is to inform bidders of items available for sale and to give bidders enough information to determine if he/she is interested in inspecting the merchandise. Bidders are cautioned that all weights, measurements, descriptions and export status listed on the flyer or catalog must be considered approximations and do not create a warranty that the merchandise actually conforms to such description.

Q: What is the condition of the merchandise:

A: Conditions of items being offered for sale varies from "New" to "Salvage." U.S. Customs and Border Protection and EG&G Technical Services make no warranties or guarantees, written, expressed, or implied as to quality, quantity, condition, usability, weight, measure, year, model, mechanical condition, performance, or other specifications.

Appeal File, Exhibit 1 at 4.

The record contains a form issued by EG&G entitled "General Order Merchandise Evaluation And Fair Market Analysis" that states in the following blocks: Fair Market Value: \$100; Date Prepared: 6/17/09; Notes/Remarks: "PETRO PALLOTTA, FECE LANNO 1797, PERUGIA." Appeal File, Exhibit 15.

On July 14, 2009, a public preview of the auction items was held at Cargo Connection in Inwood, New York, for prospective bidders. Appeal File, Exhibit 1 at 8. There is no evidence in the record that appellant attended the preview or otherwise inspected the violin prior to the auction.

On or about July 16, 2009, appellant completed a registration form agreeing to “comply with the terms of sale contained in the sale catalog.” Appeal File, Exhibit 16. On or about July 16, 2009, appellant purchased the violin at this auction for \$8600. Appeal File, Exhibit 2 .

On July 20, 2009, appellant submitted a claim to EG&G for refund of the purchase price. Appeal File, Exhibit 3. In its claim, appellant stated: “I have showed the Violin to two experts in the violin Field, and both are telling that this is a fake counterfeited Violin, and not made by [Petro Pallotta], and also as of their expertise this is for sure not a 1797, this is maybe 40-60 years old, and not 210 years old.” *Id.*

On October 13, 2009, EG&G denied appellant’s request. In so doing, the EG&G program manager referred to both the Merchandise Descriptions clause and the Condition and Description clause and stated that the purchased merchandise “conformed to its description of ‘1 CTN, VIOLIN W/CASE, PETRO PALLOTTA, FECE LANNO 1797, PERUGIA. This information was taken directly from the violin itself.” Appeal File, Exhibit 5.

On October 19, 2009, appellant submitted a claim to the contracting officer, alleging that the violin was counterfeit and requesting a refund of the purchase price. Appeal File, Exhibit 6.

By letter dated March 3, 2010, the contracting officer denied appellant’s claim, citing the Condition and Description clause. Appeal File, Exhibit 8 at 2. While the contracting officer’s final decision was issued on March 3, 2010, respondent did not transmit it to appellant until May 7, 2010. Appeal File, Exhibit 8.

On August 4, 2010, appellant appealed the contracting officer’s final decision to this Board and requested that its purchase be rescinded and that respondent refund the \$8600 that appellant paid for the violin.

Discussion

Respondent has filed a motion to dismiss for failure to state a claim upon which relief can be granted. In general, a case can only be dismissed for failure to state a claim upon which relief may be granted when that conclusion can be reached by looking solely upon the pleadings. *Tomas Olivas Ibarra v. Department of Homeland Security*, CBCA 1986, 10-2 BCA ¶ 34,573. In this case, materials outside the pleadings have been submitted, and referred to in the motion to dismiss, so we consider this motion as a motion for summary relief. *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA

282-ISDA, 09-2 BCA ¶ 34,279. Summary relief is appropriate only where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. Any doubt on whether summary relief is appropriate is to be resolved against the moving party. The moving party shoulders the burden of proving that no genuine issue of material fact exists. *Patrick C. Sullivan v. General Services Administration*, CBCA 936, 08-1 BCA ¶ 33,820.

Respondent has met its burden of proving that no genuine issue of material fact exists, and the terms and conditions of the auction deny appellant relief in this matter.

The violin which is the subject of the dispute was auctioned by respondent. The auction catalog, containing terms and conditions of sale and other information to bidders, disclaimed all warranties, stating that descriptive information taken from the merchandise may not be accurate. While the Merchandise Descriptions clause stated that the merchandise would conform to its description, the clause also stated:

The Government does not warrant the condition, quality, or merchantability of the merchandise or its fitness for any use or purpose. The condition of items offered varies from “NEW to SALVAGE.” The Purchaser understands and agrees that all merchandise is purchased and accepted “AS IS, WHERE IS” and “WITH ALL FAULTS.”

Bidders were advised to inspect the merchandise before the auction, and an opportunity to inspect the merchandise was provided two days before the auction.

The violin was described in the auction catalog as “VIOLIN W/CASE” with additional descriptive words “PETRO PALLOTTA, FECE LANNO 1797, PERUGIA” that were on the label inside the violin.

Appellant apparently assumed from the descriptive words on the violin’s label that the violin was manufactured by Petro Pallotta in 1797 in Perugia, Italy. He did not inspect the violin before purchasing it. After purchasing the violin for \$8600, appellant alleges that two appraisers told him that the violin was not made by Petro Pallotta and is at most sixty years old. Appellant seeks a refund, alleging in its notice of appeal that the violin is “counterfeit” and the Government’s sale “infringes on the international copyright law.” In its response to respondent’s motion, appellant alleges the violin is “fraudulent.”

Appellant is not entitled to a refund. The violin conformed to its description, in that it was a violin with case with a label inside the violin containing the descriptive words as stated in the catalog. Appellant’s owner interpreted these words as a representation that the

violin was actually made by Petro Pallotta in 1797. He made no attempt to inspect the violin before purchase to ascertain if it was in fact what he assumed it to be. As the site of inspection was a short drive from appellant's place of business, it would not have been unreasonable for him to hire an appraiser and inspect the violin, given the assumed value.⁴

Appellant offers no evidence as to its allegations that the violin is "counterfeit" and "fraudulent," other than to reiterate that two individuals have informed it that the violin was not made by Petro Pallotta and it is at most sixty years old.⁵ Even if this assessment is correct, these circumstances do not mean that the violin is counterfeit or fraudulent.

The law with regard to counterfeit goods applies to goods that contain a "counterfeit mark," which is a "mark that is used in connection with trafficking in goods or services that is identical or substantially indistinguishable from a mark registered for those goods or services on the principal register in the United States Patent and Trademark Office." 18 U.S.C. § 2320 (2006). There is no allegation or proof that the information on the label in the violin is registered for this purpose. Accordingly, we cannot find that the violin is a counterfeit.

With regard to the argument that the violin is "fraudulent," appellant apparently is not aware that violins are routinely mass produced as copies of violins that were made by well known violin makers, with labels that are copies of the violin makers' labels. These violins are sold as student violins or otherwise at a moderate price with the understanding that they are mass produced copies. No prudent buyer should ever purchase a violin relying solely upon information contained on its label. An appraisal by a knowledgeable expert is necessary to ascertain the authenticity of a violin.⁶ Appellant has offered no evidence in the

⁴ The distance between appellant's business address in Monsey, New York, and the site of inspection in Inwood, New York, is approximately fifty miles.

⁵ Appellant notes that EG&G had assessed the fair market value of the violin to be \$100 prior to the auction. There is no indication that this was an appraisal by one knowledgeable as to violins or that the individual making the assessment considered the violin at variance with the information on the label.

⁶ The website of the Smithsonian Institution, Washington, D.C., contains the following with regard to obtaining authentication and appraisal of violins:

The presence of a label with a famous maker name or date has no bearing on whether the instrument is genuine. Thousands upon thousands of violins were made in the 19th century as

record to suggest that the violin was manufactured with the intent to deceive a purchaser, despite the wording of the label.

In summary, the terms and conditions of the auction warned appellant that the violin was to be sold “as is” with no warranties other than it would conform to its description in the auction catalog. The violin conformed to its description in the auction catalog - a violin with a label containing words included in the description. Appellant’s owner had ample opportunity to inspect the violin prior to purchase, but he chose not to do so, relying upon his assumptions as to the meaning of the descriptive language taken from the violin’s label. Despite conforming to its description in the auction catalog, the violin was not what appellant expected it to be. There is no evidence that the violin was a counterfeit or manufactured with the intent to deceive a purchaser.

There are no issues of material fact and dispute, and under the terms and conditions of the auction, appellant is not entitled to a refund of the purchase price.

inexpensive copies of the products of great masters of the 17th and 18th centuries. At that time, the purchaser knew he was buying an inexpensive violin and accepted the label as a reference to its derivation. Catalogs from the period show that these instruments were advertised for less than \$10. As people rediscover these instruments today, the knowledge of where they came from is lost, and the labels can be misleading.

A violin’s authenticity (i.e., whether it is genuinely the product of the maker whose label or signature it bears) can only be determined through comparative study of design, model, wood characteristics, and varnish texture. This expertise is gained through examination of hundreds or even thousands of instruments, and there is no substitute for an experienced eye.

Encyclopedia Smithsonian: General Information on Obtaining Authentication and Appraisal of Violins, http://www.si.edu/Encyclopedia__SI/nmah/violappr.htm (last visited January 25, 2011).

Decision

Respondent's motion for summary relief is granted. The appeal is **DENIED**.

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ANTHONY S. BORWICK
Board Judge