

ORIGINAL

20070052

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

D.G.L. Trading Corporation,)	
Plaintiff, ³)	Supreme Court #20070052
Appellant)	
v.)	District Court #06-C-01564
)	
Jeffrey Reis,)	
Defendant. ³)	
Appellee)	

APPEAL FROM THE JUDGMENT OF THE BURLEIGH COUNTY DISTRICT
COURT ENTERED FEBRUARY 8, 2007

APPELLEE'S BRIEF

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR 24 2007

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STATE OF NORTH DAKOTA

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STATEMENT OF THE CASE

Defendant would agree that the Statement of the Case as outlined under the heading of Statement of the Case in its Appellant's Brief is a fair statement of the case, with the exception of the statement on page 6 of the Appellant's Brief:

"The parties had been doing business with each other since 2001 although the actual transactions between them numbered only four or five. In October, 2005, Reis ordered two gemstones from D.G.L.-a "diamond round" valued \$8,200 and a "diamond princess" valued at \$868. D.G.L. shipped the diamonds to Reis on the basis of "sale or return". Reis received the merchandise and no dispute exists as to the quality of the merchandise."

Reis believes that the transaction was one of "sale on approval".

DISPUTED FACTS

The only real disputed facts in the case seems to revolve around the questions of whether Reis received the goods from D.G.L. on the basis of a "sale on approval" or "sale or return".

LAW AND ARGUMENT

D.G.L. Trading Corporation contends that two issues are involved in this matter: 1) breach of payment for goods received and accepted; and 2) risk of loss of returned goods. D.G.L. would claim that both issues turn upon the same Conclusions of Law and Order being applied. D.G.L.'s citing of N.D.C.C. §41-02-43. (2-326):

1. Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:
 - a. A "sale on approval" if the goods are delivered primarily for use.
 - b. A "sale or return" if the goods are delivered primarily for resale.
2. Goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.
3. Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this chapter (section 41-02-08) and as contradicting the sale aspect of the contract within the provisions of this chapter on parol or extrinsic evidence (section 41-02-09).

is the correct statement of the North Dakota Century Code. D.G.L. would claim that the sale that took place would be covered under (1)(b). Reis would claim that the sale that took place is covered by (1)(a).

It is also correct as stated by D.G.L. that Reis ordered two gems from D.G.L., however the gems were on approval, not on a "sale or return".

Q. (Lindquist) On what terms; is it on approval or is it purchased at that time or what?

A. (Patel) It goes on approval.

Q. On approval, right?

A. Yes, sir.

Q. And so you send it out to them, and then they look at the merchandise, right?

A. Yes.

Q. And decide whether or not they want that merchandise, all or some of it; is that right?

A. Yes, sir.

Q. And how long do they have to make up their mind?

A. Within a week to two week.

Q. And then who contacts who then after that period of time?

A. I always contacted them, how do they like the merchandise. If it is not liked, then send immediately back to us.

Transcript- p.4, lines 6-23.

D.G.L.'s main officer was testifying, and very clearly, that the sale was made on approval, again D.G.L.'s officer makes the mode of transaction extremely clear:

Q. (Lindquist) Okay. Go ahead.

A. (Patel) We send this merchandise approval to them, like a memorandum to see if you like it, you can buy it, otherwise send us back.

Transcript- p.6, lines 21-24.

Discussion was had concerning the sending of money. Reis testified on direct examination:

Q. (Murtha) Now, as far as sending money, cash, is that usual or unusual or why again was that?

A. (Reis) Because of his request.

Q. He wanted cash?

A. Yes.

Q. Not a check, not a credit card, cash?

A. Yes.

Q. Was there any conversation as to how the cash should be packaged or was there any discussion on that?

A. After the package came up missing, it was an envelope, he goes, why didn't you send it in the box? Then I said, well, I've never sent in the box before. It has always been in the envelope.

Transcript- p.36, lines 2-14.

D.G.L. was consistent throughout the Trial in its claim that the merchandise was sent out "on approval" and if Reis liked it, he could buy it, otherwise he send it back. Both parties testified regarding the sending of money and their testimony differed. The Court, in questioning Attorney Lindquist, stated as follows:

LINDQUIST: ...why should the recipient, receiver, why should the burden fall upon his shoulders to seek a remedy through UPS?

THE COURT: Well, because it's his money. I mean, at the point that Mr. Reis puts it in FedEx's hands, it would seem to me that he's fulfilled his duties under their agreement. He sent payment in the way that was directed by the plaintiff.

I mean, again, we can argue about whether it should have been cash or a check and all that sort of thing, but, you know, his part of the deal was he gets the diamonds on consignment, and if he likes them, he sends the money for them. If he doesn't like them, he sends the diamond back. If he likes one and dcesn't like

the other, he pays for the one and sends the other back. And if you believe what Mr. Reis says, that's exactly what he did.

And I couldn't agree with you more, the bottom line question here is who is responsible. But where does Mr. Reis's responsibility end? Does it follow all the way to New York or does it stop when he puts it in FedEx's hands?

MR. LINQUIST: Well, if you want a brief on that issue, I would be more than happy to submit one.

THE COURT: No. It would seem to me that those questions should have been contemplated.

All right. Anything else you wanted to say, Mr. Lindquist?

MR. LINDQUIST: No, Your Honor.

Transcript- p.49, lines 22-25; p.50, lines 1-23.

Given the circumstances of the parties and the transaction, it would indeed seem strange that D.G.L. would give up ownership of the precious stones. If D.G.L. was really treating this as a "sale or return" under the Uniform Commercial Code, they would stand a chance of never seeing their stones again and not getting the money.

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N.D.C.C. 41-02-43. (2-326).

- (1) Under a sale on approval unless otherwise agreed
 - (a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and
 - (b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and
 - (c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

N.D.C.C. 41-02-44. (2-327).

The testimony in this case convinced the Court that D.G.L. dictated the terms of the return and the mode of payment and transportation. Much the same situation arose in a Missouri case, Prewitt v. Numismatic Funding Corp., 745 F.2d 1175, involving the consignment of precious coins to a coin dealer. The coin dealer decided he didn't want the coins or he didn't want all of them. So he sent them back to the seller underinsured. The coins were lost in transit and the seller sued the buyer. In that case, the Missouri Court held:

"Frederick R. Prewitt brought this declaratory judgment action against the Numismatic Funding Corporation (Numismatic) seeking a determination that the risk of loss of valuable coins sent by Numismatic to Prewitt and returned by him via mail remained with Numismatic notwithstanding that the coins were underinsured in the return mailing. Numismatic counterclaimed for the value of the coins. The district court granted Prewitt declaratory relief and rejected the counterclaim. Numismatic appeals the adverse judgment. Federal jurisdiction rests on diversity of citizenship, 28 U.S.C. § 1332. After reviewing the record, we affirm."

Prewitt v. Numismatic Funding Corp., 745 F.2d 1175

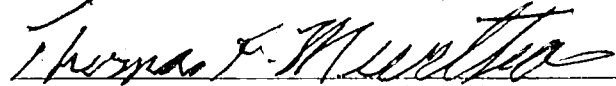
As in the case cited, this case deals with precious items unique in their nature that are dependent on inspection and trial prior to sale and that is the reason these diamonds in question were being sold on approval. The goods needed to be inspected for fitness and appeal.

Although the District Court was not asked to specifically distinguish the transaction in this case as a "sale on approval" or a "sale or return", I believe the Court reached all the right conclusions to treat the transaction as a sale on approval. The case of Prewitt v. Numismatic Funding Corp., 745 F.2d 1175, reached the same conclusion concerning items of a precious and unique nature that could be resold.

CONCLUSION

Appellee, Jeffirey Reis, respectfully requests that the judgment of the trial court be affirmed in all things.

RESPECTFULLY SUBMITTED,

A handwritten signature in cursive script, appearing to read "Thomas F. Murtha", written over a horizontal line.

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STATE OF NORTH DAKOTA

D.G.L. Trading Corporation,)
Plaintiff,) Supreme Court #20070052
) District Court #06-C-01564
v.)
) AFFIDAVIT OF SERVICE
Jeffrey Reis,) BY MAIL
Defendant.)

STATE OF NORTH DAKOTA)
) ss
COUNTY OF STARK)

Laurie Strommen, being first duly sworn, deposes and says that on the 24th day of April, 2007, she served the following documents in the above action:

APPELLEE'S BRIEF

upon the following by placing true and correct copy thereof in an envelope addressed as follows:

Dennis W. Lindquist
Attorney at Law
PO Box 490
Mandan, ND 58554-0490

and depositing the same with postage prepaid, in the United States mail.

Laurie Strommen

Subscribed and sworn to before me this 24th day of April, 2007.

JENNIFER J JAHNER
Notary Public
State of North Dakota
My Commission Expires July 18, 2011

Jennifer J. Jahner
Jennifer J. Jahner, Notary Public
Stark County, North Dakota
My Commission Expires: 07/18/11