Buffalo Law Review

Volume 5 | Number 2 Article 65

1-1-1956

Sales—Sale by Sample

James Lindsay

Sale by Sample

Alper Blouse Company v. E. E. Conner & Co., Inc.[14] was an action to recover the purchase price paid for cloth which plaintiff refused to accept because of defective quality. The goods when first delivered were unsuitable for the purpose for which it was known they were to be used. The buyer was at that time privileged to return them and receive back the purchase price. Instead, the buyer entered into an agreement whereby the seller agreed to take back the goods, refinish them, and then submit a new sample for the buyer's approval. The buyer never approved the sample but the seller delivered the goods despite the buyer's failure to approve.

Where a sale is made subject to the buyer's satisfaction, his approval becomes a condition precedent to his obligation to accept the merchandise.[15] While the power to withhold approval is an untrammelled one where the object of the contract is "to gratify taste, serve personal convenience, or satisfy individual preference,"[16] a different rule ordinarily prevails in this state for commercial contracts where the suitability of the goods is a matter of "mechanical fitness, utility, or marketability;"[17] in such a case, the contract is "construed as imposing upon the seller the requirement only that a reasonable man . . . be satisfied with the performance."[18]

The contract in this case in no way involved personal taste or preference, and therefore, if the sample depicted goods suitable for their purpose, plaintiff was under the necessity of approving it. The problem for the Court was that there was no evidence that the bulk of the goods was similar to the sample.

In the case of sale by sample, there is an implied warranty that the bulk shall correspond with the sample in quality,[19] placing upon the seller the burden of not only establishing that the sample was satisfactory[20] but demonstrating that

14. 309 N. Y. 67, 127 N. E. 2d 813 (1955).
15. *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406 (1889); *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749 (1886); *Atlas Shoe Co. v. Lewis*, 202 App. Div. 244, 195 N. Y. Supp. 618 (3rd Dep't 1922); 1 WILLISTON, SALES §§ 191-191a, at 483-488 (rev. ed. 1948).
16. *Duplex Safety Boiler Co. v. Garden, supra* note 15.
17. 3 WILLISTON, CONTRACTS 1946 (rev. ed. 1936).
18. 1 WILLISTON, SALES § 191, at 485; *Duplex Safety Boiler Co. v. Garden, supra* note 15; *Hammel v. Stern*, 21 App. Div. 544, 48 N. Y. Supp. 528 (1st Dep't 1897), *aff'd*, 164 N. Y. 603, 58 N. E. 1088 (1900); 1 RESTATEMENT, CONTRACTS §265 (1932).
19. N. Y. PERSONAL PROPERTY LAW § 97.
20. *Doll v. Noble, supra* note 15; *Bowery Nat. Bank v. Mayor of New York*, 63 N. Y. 336 (1875).

the goods subsequently shipped actually matched the sample exhibited.[21] If the seller fails to prove that fact he can not insist upon acceptance by the buyer.[22]

Since the defendant did not meet the burden of proof the judgment for him was reversed and a new trial ordered. For another reason for reversal and a new trial, the dissent in the Appellate Division[23] makes interesting reading, especially as to the facts which provoked the following statement: "Here, because of the well-intended but unfortunate remarks of the trial court, the jury took the easy way out and to avoid buying their dinners and being kept late in the evening, produced a verdict. The plaintiff, in effect, was deprived of his day in court."[24]

Implied Warranties

Plaintiff became ill with jaundice after receiving a transfusion of contaminated blood as a part of her treatment while a patient at the defendant hospital, and for which she paid sixty dollars. The complaint alleged a breach of implied warranties of fitness of purpose and merchantability. The Appellate Division affirmed the trial court's denial of a motion to dismiss the complaint for failure to state a cause of action.[25] The Court of Appeals reversed on the ground that the transaction did not constitute a sale to which warranties could attach.[26]

Section 96 of the Personal Property Law provides for implied warranties of quality on a contract to sell[27] or a sale of goods.[28] Whether a transaction involving personal services in which there has been a transfer of title in goods is or can be considered a contract to sell, within the meaning of this section for purposes of a warranty in all cases, had not been directly answered before this case; with the exception of the above mentioned statute, the Sales Act contains no criterion which can be applied in deciding whether a contract is for a sale or for services, although a statutory test is provided in Statute of Frauds cases for a

21. *Frankel v. Foreman & Clark,* 33 F. 2d 83 (2d Cir. 1929), applying the law of New York; 1 WILLISTON, SALES § 255 at 677 (rev. ed. 1948).
22. *A. & S. Henry & Co. v. Talcott,* 175 N. Y. 385, 67 N. E. 617 (1903); 4 WILLISTON, CONTRACTS § 1002 at 2762 (rev. ed. 1936).
23. 284 App. Div. 954, 135 N. Y. S. 2d 52 (1st Dep't 1954).
24. *Id.* at 956, 135 N. Y. S. 2d at 56.
25. 283 App. Div. 789, 129 N. Y. S. 2d 232 (1st Dep't 1954).
26. 308 N. Y. 100, 123 N. E. 2d 792 (1955).
27. *Haag v. Klee,* 162 Misc. 250, 293 N. Y. Supp. 266 (1936), held that there must be a contract to sell before implied warranties can arise.
28. N. Y. PERSONAL PROPERTY LAW § 82: "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." "A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price."