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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 07-22-2010
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BY: GH

AMERICAN FINE ARTS EDITION,) 1 CA-CV 09-0677
INC., an Arizona corporation,)
) DEPARTMENT D
Plaintiff-Appellee,)
) **MEMORANDUM DECISION**
v.)
)
NIMESHBHA PATEL and JANE DOE) (Not for Publication -
PATEL, husband and wife,) Rule 28, Arizona Rules
) of Civil Appellate Procedure)
Defendants-Appellants.)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2007-001373

The Honorable John Rea, Judge

REVERSED AND REMANDED

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W E I S B E R G, Judge

¶1 Nimeshbha Patel ("Patel") and his wife, Sejal Patel, appeal from the superior court's judgment in favor of American Fine Arts Editions, Inc. ("AFAE"). The Patels contend that the court erred in concluding that they bore the risk of loss when AFAE surrendered two paintings to a shipper at AFAE's Scottsdale, Arizona gallery for shipment to the Patels' home in New Jersey, even though the Patels never received the paintings. For reasons that follow, we reverse and remand.

BACKGROUND

¶2 In September 2005, Patel was in Arizona on business and visited AFAE's gallery. After talking with a salesman, Patel wrote his name and address in New Jersey on an invoice that listed two framed paintings and included "Shipping and Packing" in the price of \$15,000, plus \$247.50 in tax. Under "Terms and Special Conditions," the invoice stated that part of the purchase price would be billed to two different credit cards and added: "*Ship to address above.*" (Emphasis added.) Patel also signed two credit card receipts. AFAE contracted with FedEx Corporation Services, Inc. ("FedEx") to deliver the paintings to Patel.

¶3 In November 2005, AFAE received notice that Patel had requested a "charge back" from one of his credit card issuers in

the amount of \$7,247.50. In a statement of October 15 to the second credit card issuer, Patel said that he had not received the paintings as of September 30; had left the country after that; and had called AFAE three times, left messages twice, but had heard no response. That issuer similarly posted a charge back for \$8,000.

¶4 AFAE filed suit against the Patels and FedEx to recover the cost of the paintings. The case proceeded to arbitration.

¶5 Robert Frank, a quality manager of FedEx Home Delivery, was deposed. Frank testified that the shipping label for Patel stated "HOME" and "DIRECT SIGN" and that such a package would require a signature of any responsible person at the delivery address. Frank also identified a form dated November 10, 2005 called Proof of Delivery, which stated delivery had occurred on October 6, 2005,¹ that the package had been "[s]igned for by N. Paterl" and showed an illegible signature below which was typed "N.PATERL." There was no process for requiring only Patel to sign for a package, but if another person had signed for him, there would be a notation of that fact and that person's signature on the delivery form.

¹Patel provided evidence that he flew to India on October 1, 2005 and returned to New Jersey on October 8.

¶16 FedEx provided a letter to AFAE's counsel revealing the name of the delivery person and stating that he was a temporary worker² for a contractor to FedEx and had attempted to deliver ten times without success. Frank said that FedEx "uses contractors for all of their deliveries" and when needed hired temporary drivers. He also said the driver "would scan their packages undeliverable" if delivery attempts were unsuccessful.

¶17 The arbitrator found for Patel. AFAE appealed to the superior court.

¶18 After a bench trial, the court concluded that Arizona Revised Statutes ("A.R.S.") section 47-2509(A)(1) (2005) placed the risk of loss on Patel because the contract authorized AFAE to ship the goods by carrier but did not require *delivery* to a particular destination. Thus, this was a "shipment" contract rather than a "destination" contract; AFAE had told Patel that shipping would take two to four weeks; and shipping and delivery had been accomplished within that period. The court therefore held that risk of loss had passed to Patel when AFAE placed the goods with FedEx and that AFAE was entitled to judgment for \$15,247.50, the amount of the invoice.

²At trial, the parties stipulated that FedEx had not been able to locate the temporary driver.

¶9 The Patels unsuccessfully moved for reconsideration, and after entry of judgment timely filed a notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B)(2003).

DISCUSSION

¶10 Proper interpretation of a contract is a question of law that we review *de novo*. *State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, 119, ¶ 5, 75 P.3d 1075, 1077 (App. 2003). We apply the clearly erroneous standard to the superior court's factual findings. *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 555, ¶ 27, 20 P.3d 590, 598 (App. 2001).

¶11 At trial, Jeff Dippold testified that he sold the paintings to Patel on September 9, 2005. Dippold stated that at the time of sale, he informed Patel that AFAE delivered paintings all the time; that if AFAE handled the delivery, he would have nothing to worry about; and that the paintings would arrive on his doorstep in the same condition as they had been in the gallery. Dippold said that he had offered Patel insurance, that in eight years no one had ever accepted the insurance, and that Patel said "[he] would just let us handle how we normally ship," for which AFAE charged \$500. Dippold informed Patel that two to four weeks was average for delivery time, which he clarified was the time before AFAE would send the art out.

¶12 Dippold said that he did not provide a tracking slip to Patel but that with "most people I just call them up and tell them which day it's going to be there." In this case, however, he never called Patel to tell him that the art was about to be or had been shipped or what day it would arrive. Instead, telephone records showed that Dippold called Patel on October 10 and 29, 2005. The first call was .6 minutes, and Dippold said that he left a voice mail to make sure "everything was received perfect." He called again on October 29 because he had not heard from Patel.

¶13 We first address the contention that this was not a shipment contract. The invoice clearly stated: "Ship to above address" but did not require *delivery* to a particular destination. Therefore, it was a contract for shipment but not delivery. See *Carlson v. Monaco Coach Corp.*, 486 F.Supp.2d 1127, 1130 (E.D. Cal. 2007) (sales contract that provided for delivery to buyer on date of signing but not delivery to any particular location was shipping contract); *Gusse v. Damon Corp.*, 470 F.Supp.2d 1110, 1113 (C.D. Cal. 2007) (accord).

¶14 We next consider the assertion that even if this were a shipment contract, AFAE never gave the required "prompt notice" of shipping and thus the risk of loss did not shift from it upon delivery of the art to FedEx. As the superior court

found, A.R.S. § 47-2509(A) applies to shipment contracts. It provides in part that when a contract "requires or authorizes the seller to ship the goods by carrier: 1. If it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier" As noted, the invoice did not require delivery to Patel's address, and thus it was a shipment contract.

¶15 Nonetheless, where the seller is authorized to send goods to a buyer, in order for the seller to make a valid tender of delivery to a carrier, A.R.S. § 47-2504 (2005) requires the seller, if "the contract does not require him to deliver them at a particular destination, . . . [to] [p]ut the goods in the possession of such a carrier" and make a reasonable contract for transportation given the type of goods and the circumstances. The seller also must "[o]btain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods." And *the seller must "[p]romptly notify the buyer of the shipment."* (Emphasis added.) If the seller fails to notify the buyer of the shipment, the buyer may

reject the goods "only if material delay or loss ensues."
A.R.S. § 47-2504(1)-(3).³

¶16 Section 47-1201(26) (2005) states that one notifies another "by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it." Thus, one receives notice if it either "comes to his attention or . . . is duly delivered at the place of business through which the contract was made"

¶17 There was no evidence that AFAE gave any notice to Patel of the shipment. Failure to give prompt notice of a shipment may forestall shifting the risk of loss to a buyer. For example, in *Rheinberg-Kellerei GMBH v. Vineyard Wine Co., Inc.*, 281 S.E. 2d 425, (N.C. App. 1981), a German wine exporter shipped numerous cases of wine to a customer in North Carolina. On November 27, 1978 the exporter gave notice to its American agent of the date of shipment, the port of origin and vessel name, and the estimated date and port of arrival. *Id.* at 426. The agent did not convey that information to the buyer, however. *Id.* The exporter delivered the wine to a ship on November 29 and sent documents to its bank, which forwarded them to a U.S.

³AFAE argues that Patel could reject the goods only if material delay or loss ensued and that Patel failed to show a causative link between its failure to give notice and Patel's loss. Lack of causation is irrelevant if AFAE never gave the required prompt notice of shipment.

bank and which would allow the buyer to claim the wine after making payment. *Id.* Between December 12 and 22, the ship carrying the wine sank, and on January 24, 1979, the buyer learned of the loss, and thus received no wine and declined to pay for the lost cargo. *Id.* at 427.

¶18 The exporter sued the buyer, and the trial court held that the purpose of the notice requirement "is so that the buyer . . . may make necessary arrangements for cargo insurance and otherwise to protect itself against any ensuing loss." *Id.* Because the agent had not provided any of the needed information for the buyer to have obtained insurance or otherwise protected itself, the risk of loss did not pass to the buyer upon delivery to the carrier but remained with the seller. *Id.* The appellate court affirmed. It held that "[w]here the buyer, upon shipment by seller, assumed the perils involved in carriage" a buyer "must have a reasonable opportunity to guard against these risks by independent arrangements with the carrier." Nothing that the shipping documents were not received until December 27, after the loss, the court further held that what is "prompt" will vary with the circumstances of each case. *Id.* at 428.

¶19 Here, the Patels did not receive prompt or indeed any notice of AFAE's delivery of the paintings to FedEx on September 28. Therefore, they had no opportunity to take precautions or

other measures to guard against the risk of loss during transit or delivery attempts. In light of this undisputed omission by AFAE, we reverse the superior court's judgment and remand for entry of judgment in favor of the Patels. Pursuant to A.R.S. §§ 12-341 and 12-341.01 (2003), we grant the Patels' request for an award of attorney's fees and costs subject to compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/ _____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/ _____
MICHAEL J. BROWN, Presiding Judge

/s/ _____
JON W. THOMPSON, Judge