

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

GREG WOOD,)
)
 Plaintiff,)
 v.) C.A. No. CPU6-08-001146
)
 WATSON'S AUCTION SERVICE,)
 and GLEN WATSON,)
)
 Defendants.)

Submitted: October 18, 2010
Decided: December 1, 2010

Greg Wood, self-represented Plaintiff.
William M. Chasanov, Esq., counsel for Defendants.

DECISION AFTER TRIAL

CLARK, J.

Plaintiff Greg Wood brings this action for breach of contract, negligence, breach of warranties, and consumer fraud in connection with an auction conducted on his behalf by Defendants Glenn Watson and Watson's Auction Service, Inc. Trial was held on October 6, 2010, and the parties subsequently submitted written closing arguments. The Court finds in favor of the Plaintiff for the reasons set forth herein.

FACTS

Glen Watson is an auctioneer and the principal of Watson's Auction Service, Inc. ("Watson"). Plaintiff Wood was the owner of a large and varied collection of Native American, African and other ethnic artifacts, pottery, rugs, art pieces, and other collectibles and antiques. Beginning in May, 2007, Watson and Wood began a protracted discussion, orally and by numerous e-mails, to plan the auction of Wood's collection by Watson in September. It is apparent through the testimony and evidence that the parties anticipated and agreed to an online auction in addition to a conventional

on-site auction to be held at Watson's Auction Service's place of business. The online auction was to take place on eBay simultaneous with the conduction of the on-site auction. On July 25, 2007, the parties executed a written contract. The one page, "fill in the blank" form contract, drafted by Watson, provided, *inter alia*, that Watson would "sell said property, using his professional skill, knowledge and experience to the best advantage of both parties in preparing and conducting the sale," and would "receive as compensation for promoting and conducting" an auction of Wood's personal property "20% of the gross selling price" realized from the auction. The contract did not detail the manner in which the parties expected Watson's Auction Service to conduct the auction, nor did it disclose that Watson intended to charge successful bidders a "buyer's premium".¹

On July 6, 2007, Wood tendered Watson 637 items designated for auction. He provided Watson a handwritten inventory of the items; most of the inventory entries were three to six words in length. Watson subsequently created online listings for the items. He did this by entering information provided to him by Wood into iCollector, an online program designed to categorize and present an item on eBay. Each listing Watson created contained a photograph of the item, taken by Watson, and a brief description composed by Watson.

On August 29, 2007, Watson informed Wood that the listings were fully prepared and ready for the auction, which Watson scheduled for September 1, 2007. After inspecting the auction listings on eBay, however, Wood found that he could not locate many of his items through eBay's search engine.

¹ A buyer's premium is a surcharge of some percentage that is charged to successful buyers at auction. It is designed to provide the auction house with additional compensation. Here, Watson's Auction Service charged a 13 percent surcharge.

The testimony at trial revealed two explanations for this difficulty. First, Watson stated in an email to Wood that he did not have time to create listings for every item and, therefore, they did not exist to appear within the search results.

Second, many of the listings failed to correctly spell, describe, label, or categorize the particular items. This resulted in eBay's failure to properly index the listing which, in turn, caused the listing not to appear within appropriate search results. For example, a Russian religious icon incorrectly labeled as "music/records" could only be found when searched in that category. These errors caused Wood great concern because the mislabeling of items would cause the items to be inaccessible for the online portion of the auction, or if found by online bidders, would artificially reduce the bids on items. Bidders looking for "music/records" would have little interest in a Russian religious icon, and serious bidders interested in Russian religious icons who found the icon listed in the "music/records" category would bid low on the item, because fewer serious bidders would find it so mis-categorized. Although Watson testified that many of the listing and categorization errors were committed by iCollector, Watson chose to use this service in carrying out the online auction, and is responsible for the errors of its subcontractor.

The evidence shows that, on August 29 and 30th, Wood transmitted numerous corrections to Watson of errors and incomplete descriptions he found in the online listings. Although Watson was able to make some corrections, many of the listings remained incorrect at the time of auction. The auction was held on September 1, 2007. Many of the items consigned for auction were not sold, and Wood testified that most items sold brought considerably less than their market value. The gross sales amount collected on the items auctioned was \$21,230.00. Defendant received both a 20% auctioneer's commission, and a 13% buyer's premium. Wood alleges in his complaint that, as a result of Watson's breach of contract and negligence, he has "sustained

significant monetary damages,” due to the faulty way in which the auction was handled by Watson.

DISCUSSION

Breach of Contract

To prove a breach of contract, a plaintiff must show by a preponderance of the evidence that a contract existed, that the defendant breached an obligation imposed by the contract, and that the plaintiff suffered damages as result of the breach.²

The parties do not dispute the existence of a contract. Plaintiff Wood claims that defendant Watson’s Auction Service failed to adequately perform the promotion of the online auction as obligated by the contract. Before the Court can discuss whether Watson’s Auction Service breached this obligation, it must first determine whether the contract contemplated the obligation to extend to an online auction and, if so, what meaning the parties intended by the word “promotion” in this context.

When there is a written contract, the plain language of a contract will be given its plain meaning.³ However, if there is an ambiguity in the terms or drafting of the contract, that ambiguity will be resolved against the party who drafted the contract.⁴ When the language of a contract is ambiguous, the Court may use extrinsic evidence to interpret the intent of the parties.⁵ Likewise, when an ambiguity exists in a contract, the intentions of the parties are to be gleaned from their actions.⁶

Often, as here, a written contract is not executed until after the parties to the contract have given assurances, made promises, and reached understandings. Indeed, the written contract is designed to encompass these understandings. Since the written

² *VLIW Tech, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

³ *Interactive Corp. v. Vivendi Universal, S.A.*, 2004 WL 1572932, at *9 (Del. Ch. June 30, 2004); *Phillips Home Builders v. The Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. Super. 1997).

⁴ *See. e.g., E.I. dupont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108 (Del. Super. 1995) .

⁵ *Eagle Industries, Inc. v. Devilbiss Health Care, Inc., Telcom-SNI Investors, L.L.C. v. Sorrento Networks, Inc.*, 2001 WL 1117505, *5, 6 (Del. Ch.).

⁶ *Nemeth v. Schweizer*, 536 A.2d 615, 616 (Del. 1987).

contract is the final reduction and summation of the negotiated terms, under the parol evidence rule, evidence of a prior or contemporaneous agreement is inadmissible if it would vary or contradict the terms of a final and complete writing.⁷ A final and complete writing is said to be a complete integration of the parties' understandings.

Although the parol evidence rule bars the Court's consideration of evidence that would contradict a complete agreement, the rule does not "prohibit the *supplementation of partially* integrated contracts by evidence of an oral agreement that is consistent with, and does not contradict the writing."⁸ The parties' conduct in the course of performance of the contract may also supplement the terms of a partially integrated agreement.⁹ An agreement is partially integrated if evidence of prior negotiations suggests that a contract is not a final or complete expression of their understanding.¹⁰

The contract at issue here refers to the Defendant's obligation to "promote," "prepare" and "conduct" the auction, but does not state the manner in which Watson's Auction Service was to perform these terms. Given the references to these obligations, the parties' prior negotiations concerning them, and the actual performance rendered both before and after execution of the contract, the Court finds that the parties intended to incorporate their prior understanding of the terms into the written contract. Because the parties did not do so, this contract is an incomplete expression of the parties' agreement and a partial integration. The contract's terms may therefore be supplemented by evidence of the parties' prior understandings and course of performance.

The Court finds based on the credible testimony and documentary evidence admitted at trial that each party understood Watson's Auction Service's obligation to

⁷ See *Carey v. Shellburne, Inc.*, 224 A.2d 400, 402 (Del. 1966).

⁸ *Taylor v. Jones*, 2002 WL 31926612, at *3 (Del. Ch. Ct. Dec. 17, 2002) (emphasis in original).

⁹ *Artesian Water Co. v. State, Dept. of Highways and Trasnp.*, 330 A.2d 441, 443 (Del. 1974).

¹⁰ See *Restatement (Second) of Contracts* § 209(3) (1981).

include both an online and on-site component to the auction. It is further evidenced through Watson's conduct that Watson's Auction Service was also obligated to create listings that contained photographs and descriptions of the items for the purpose of the online auction's promotion.

To determine whether Watson's Auction Service breached its obligation of "promotion," the Court must determine the parties' understanding of the term.

In the context of an auction contract, the plain meaning of the word "promotion" is the advancement, furtherance, and encouragement of the auction.

Proper advancement of an auction necessarily requires that the bidding public be able to access it. In the context of an online auction, accessibility requires the items for sale to be properly categorized and described so that they appear within the bidders' search results.

The Court finds from the evidence that the parties' intention was that Watson was to "promote" and "prepare" the auction by, among other obligations, creating and posting an online listing and inventory of Wood's items, consisting of proper labeling, accurate descriptions and photographs of each item, and proper categorization for online searching and identification.

The Court finds that Watson's Auction Service failed to correctly label, describe and categorize much of Wood's collection and, as a result, many items did not appear within bidders' search results. The evidence contains numerous examples of egregious errors in spelling and labeling. For example, Watson's Auction Service so poorly described and labeled an African headdress that it caused eBay to index the item under the "belt buckles" category. Consequently, if a bidder was in the market for such a headdress it is unlikely that it would be found in his or her search results.

Because it did not provide bidders full access to Wood's items through accurate descriptions and categorizations to render accurate search results, Watson's Auction Service did not advance the auction and did not promote it as required under the contract.

Buyer's Premium

An auction house is an agent that acts on the behalf of the seller.¹¹ As his agent, Watson's Auction Service owed Wood fiduciary duties.¹² These general duties include the duty of loyalty. Pursuant to this duty, an agent must disclose information that is relevant to the agency to which it was entrusted and not act adversely to the principal's interest.¹³ Moreover, "an agent has a duty not to acquire material benefits in connection with transactions or other actions undertaken on the principal's behalf..."¹⁴

Watson's Auction Service owed Wood these fiduciary duties and, consequently, the additional duty to disclose material benefits obtained in connection with the auction.

The Court finds that the buyer's premium adversely affected the success of the auction. A rational potential bidder will take into account the additional cost of the premium when determining the amount of money he or she is willing to bid on an item. As a result, bidders will place smaller bids than they would otherwise and the return at auction for the seller is, therefore, diminished. By collecting the buyer's premium as additional compensation in connection with the auction, Watson's Auction Service obtained a material benefit at Wood's expense. "The general rule that an agent's duties require a full disclosure of all facts that have a material bearing on the subject of the

¹¹ See, e.g., *Krahmer v. Christie's Inc.*, 903 A.2d 773, 781 (Del. Ch. 2006) (quoting *Christallina S.A. v. Christie, Manson & Woods Int'l, Inc.*, 502 N.Y.S.2d 165 (N.Y. App. Div. 1986)).

¹² *Id.*, 903 A.2d at 781.

¹³ *Sci. Accessories Corp. v. Summagraphics Corp.*, 945 A.2d 957, 962 (Del. 1980).

¹⁴ *Restatement (Third) of Agency* § 8.02 cmt. a (2006).

agency . . . has been applied to an auctioneer, and acts which may directly limit or chill a bid at an auction are within that category.”¹⁵

Although the Court heard testimony to the effect that buyer’s premiums are not unusual in the auctioneering trade, the fiduciary duty of loyalty required Watson’s Auction Service to disclose its use of such premium where it may adversely affect the return Wood would receive in the auction. It did not do so until long after the execution of the contract. Accordingly, Watson’s Auction Service, Inc. breached its fiduciary duty of loyalty to Wood.

Remaining Causes of Action; Individual Defendant

Plaintiff’s Complaint was drafted and signed by his attorney of record at the time of filing. In addition to the first count of breach of contract, it set forth additional counts for breach of express and implied warranties, negligence and consumer fraud. Plaintiff’s attorney was granted leave to withdraw on April 29, 2010, however, and Plaintiff represented himself at trial. Plaintiff apparently abandoned, or at least failed to carry his burden of going forward with the evidence, as to the breach of warranties and consumer fraud claims¹⁶. In addition, the Court finds that Plaintiff failed to meet his burden of proof as to the negligence claim. Plaintiff failed to establish that Defendants’ breach of duty was the proximate cause of foreseeably certain damages; namely, an amount he would have realized from the auction but for any negligence committed by Defendants.

Finally, the individual defendant, Glen Watson, was not a party to the contract, and is not liable for damages for its breach. Since the Court finds for Plaintiff only on

¹⁵ 7 *Am.Jur.2d* § 62.

¹⁶ Further, as to the consumer fraud claim, 6 *Del. C. § 2513* is only applicable to deceptive practices “in connection with the sale, lease or advertisement of any merchandise.” Plaintiff was not the consumer of merchandise offered by Defendant, but of his auction services.

the breach of contract claim and the fiduciary duties arising therefrom, judgment is entered in favor of defendant Glen Watson.

Damages

The standard measure for damages recoverable for breach of contract is the expectation interest of the non-breaching party.¹⁷ To be entitled to expectation damages, the plaintiff “must show that the injuries suffered are not speculative or uncertain, and that the Court may make a reasonable estimate as to an amount of damages.”¹⁸ This requires proof of damages to a reasonable certainty.¹⁹

Because the success of an auction is inherently speculative, so is Wood’s expectation interest. Plaintiff cannot prove what he would have realized on the auction if Defendant had properly performed his services. The Court finds from the evidence, however, that, due to Defendant’s breach of the contract and its fiduciary duties owed Plaintiff, Plaintiff failed to receive the benefit of his bargain, and is entitled to repayment of the 20% commission he paid Defendant under the contract. Further, the only rational conclusion is that the undisclosed 13% buyer’s premium reduced Plaintiff’s proceeds by 13 percent. Thus, Plaintiff’s damages include the 13% buyer’s premium as well.

The evidence established that the gross total sales of the auction were \$21,230.00, less \$625.00 Plaintiff successfully bid on his own items to prevent their undervalued sale, and on which he was not charged commissions. Defendant’s commission on this amount was \$4,121.00. The 13% buyer’s premium on that amount is \$2,678.65. Thus, the total damages are \$6,799.65.

¹⁷ *E.I. Dupont de Nemours and Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996).

¹⁸ *LaPoint v. AmerisourceBergen Corp.*, 2007 WL 2565709, at *9 (Del. Ch. Sept. 4, 2007) *aff’d sub nom. AmerisourceBergen Corp. v. LaPoint*, 956 A.2d 652 (Del. 2008).

¹⁹ *Id.*

CONCLUSION

The contract between the parties for Defendant to promote and conduct an auction of Plaintiff's items included both a simultaneous live and online auction. Defendant breached the agreement by defectively promoting and conducting the online portion of the auction. The auction agreement also created an agency fiduciary duty of Defendant to act in the utmost good faith and in the interest of Plaintiff throughout the relationship. Defendant breached that duty by charging successful bidders a "buyer's premium" of 13%, which would lower the high bid, without disclosing the premium to Plaintiff in the agreement. Plaintiff is entitled to contractual damages of both the 20% commission paid to Defendant, and the 13% buyer's premium. Judgment is entered in favor of Plaintiff and against Defendant Watson's Auction Service, Inc. in the total amount of \$6,799.65, plus post-judgment interest thereon at the legal rate, plus costs of suit. Judgment is entered in favor of Defendant Glen Watson.

IT IS SO ORDERED.

Kenneth S. Clark, Jr.
Judge