

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Jerry Bruce,)

Appellant,)

v.)

Morphy Auctions, Inc.)

Respondent.)

IN THE CIRCUIT COURT
THIRTEENTH JUDICIAL CIRCUIT

2017-CP-23-06269

APPEAL FROM THE GREENVILLE
COUNTY MAGISTRATE COURT
C. A. NO. 2016CV2310800670

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FEB 20 2018

SC Court of Appeals

This matter came before me for a hearing on the appeal of Jerry Bruce appealing an order of the Magistrate Court for Greenville County, South Carolina. Present at the hearing on behalf of the appellant Jerry Bruce was O.W. Bannister of the law firm Bannister, Wyatt & Stalvey, LLC. Present at the hearing on behalf of the respondent, Morphy Auctions, Inc. ("Morphy Auctions") was Adam C. Bach of the law firm Eller Tonnsen Bach, LLC.

The facts of this case are not in dispute. As found by the magistrate court, Bruce purchased items in an online auction from Morphy Auctions. The purchased items were shipped to Bruce's home via Federal Express, a common carrier. Federal Express's standard terms and conditions for shipping applied to the shipment and no special or express terms were requested by either Bruce or Morphy Auctions. Federal Express delivered the goods to Bruce's home where they were signed for by an unknown third-party unaffiliated with Bruce and were stolen by that third-party. Bruce filed suit against Federal Express and Morphy Auctions for negligence and breach of contract. Bruce also sought payment of insurance proceeds in the amount of \$1,000.00 placed on the shipment by Morphy Auction. Morphy Auctions agreed Bruce was owed the insurance proceeds and attempted to tender that amount to him on October 18, 2016. Its check was never cashed.

The case proceeded to a bench trial on February 2, 2017 and judgment was entered in favor of Bruce ("First Order"). Morphy Auctions timely filed a motion to reconsider and a motion for a new trial, and the court granted the motion for a new trial. A second trial was held on April 4, 2017. Following the second trial, the court entered an order finding that Bruce was entitled to recover insurance proceeds from Morphy Auctions in the amount of \$1,080.00 but that Bruce could not recover the value of the shipped items because the risk of loss passed to Bruce upon their tender to Federal Express pursuant to the South Carolina Commercial Code, 36-2-101, *et. seq.* (the "Second Order"). Bruce appealed the Second Order.

Argument

Both parties agree that the South Carolina Commercial Code's risk of loss provisions govern this transaction and their dispute. Where goods are shipped by a common carrier, the Commercial Code provides as follows:

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) 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 even though the shipment is under reservation (§ 36-2-505)

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

S.C. Code § 36-2-509. Contracts providing for shipment pursuant to subsection (a) are referred to as "shipment contracts;" contracts providing for shipment pursuant to subsection (b) are referred to as "destination contracts."

As explained by the South Carolina Reporter's Comments, "Subsection (1)(a) deals with the normal type of shipment contract with risk of loss passing to the buyer when the goods are 'duly delivered to the carrier'... Under existing law it is assumed the parties intend title and thus risk of loss to pass upon delivery of the goods to the carrier since this constitutes delivery to the buyer and nothing further remains to be done by the seller." *See* S.C. Code § 36-2-509 at South Carolina Reporter's Comments.

The Comments go on to explain "Subsection (1)(b) treats the risk of loss problems for 'destination contract,' e.g. F.O.B. point of destination." Under a "destination contract,' the seller is required to deliver conforming good to the buyer at the named destination." 67 Am. Jur. 2d Sales § 482. As explained by American Jurisprudence:

[T]here is a strong presumption against the creation of "destination" contracts, and unless the parties expressly specify that the contract requires the seller to deliver to a particular destination, the contract is generally construed as one for shipment. Thus, a sales contract which merely provides that the goods will be shipped to a given location will be deemed a shipment contract under which delivery occurs, and title passes, when possession of the goods is transferred to the carrier. A "destination" contract is considered to be the variant contract under which the seller specifically agrees to deliver the goods sold to the buyer at a particular destination and to bear the risk of loss until tender of delivery... The parties must explicitly agree to a "destination contract;" otherwise, the contract will be considered to be a shipment contract."

Id. The parties can agree to a "destination contract" by express language in the contract stating so or by using delivery terms such as "f.o.b. place of destination." Id. As explained by the South Carolina Reporter's Comments, this practice is in accord with pre-UCC case law. *See* S.C. Code 36-2-509 rpt. cmt. (citing J.B. Colt v. Fox, 118 S.C. 372, 110 S.E. 401 (1922); Oxweld Acetylene Co. v. Davis, 115 S.C. 526, 106 S.E. 157 (1921); Standard Boiler and Plate Iron Co. v. Brock, 112 S.C. 323, 99 S.E. 769 (1919))

No explicit or express terms were included in the contract making this a “destination contract” and, therefore, S.C. Code § 36-2-509(1)(a) applies. The risk of loss passed to the plaintiff upon Morphy Auctions tender of the goods to the common carrier Federal Express. Following tender to Federal Express, the “buyer is liable for the purchase price of shipped goods although he claims that he has not received them. It is immaterial that the goods have been lost by the carrier, hijacked while in the carrier’s possession...or [the carrier] delivers them to the wrong person.” 67 Am. Jur. 2d Sales at § 362.

Bruce argues that the contract was a destination contract because Morphy Auction shipped the goods to a particular destination – Bruce’s home address. But this interpretation of § 509 would render subsection (a) and the provisions dealing with shipment contracts meaningless – all shipments tendered to a common carrier provide a particular address for shipment. Our courts “must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...” CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Interpreting subsection (a) to mean that giving a common carrier an address for shipment results in the creation of a destination contract would render subsection (a) superfluous.

Thus, the magistrate court correctly interpreted and applied § 509. The shipment by Morphy Auctions via Federal Express was a shipment contract because the contract did not require Morphy Auctions to transport the goods to a particular destination, it only required that Morphy Auctions put the goods in the hands of a common carrier for shipment pursuant to Bruce’s instructions. As explained by both the South Carolina Reporter Comments and American Jurisprudence, a shipment contract is the default form of contract and “explicit” terms must be

used if the seller and buyer intend a destination contract. No such terms were used here and the magistrate court's Second Order is **AFFIRMED**.

AND IT IS SO ORDERED.

Judge, Thirteenth Judicial Circuit

January 8, 2018

Greenville, South Carolina



Greenville Common Pleas

Case Caption: Jerry Bruce VS Morphy Auctions Inc

Case Number: 2017CP2306269

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158