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Utah Supreme Court

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DOCKET NO. 860102-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL BAUM d/b/a BAUMWEAR BY MICHAEL BAUM,	)	
Plaintiff-Appellee,	)	860102CA
vs.	)	Case No. 20493
DEAN KNIGHT, d/b/a THE FASHION CORNER,	)	
Defendant-Appellant,	)	

REPLY BRIEF OF DEFENDANT-APPELLANT DEAN KNIGHT d/b/a THE FASHION CORNER

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE LEONARD H. RUSSON PRESIDING

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REPLY BRIEF OF DEFENDANT-APPELLANT DEAN KNIGHT d/b/a THE FASHION CORNER

Defendant-Appellant Dean Knight ("Knight") hereby submits his Reply Brief for the Court's consideration.

ARGUMENT

I.

KNIGHT WAS ENTITLED TO REJECT THE GOODS SHIPPED BY BAUM AS NON-CONFORMING

In his brief, Baum suggests to the court that Knight was not legally entitled to reject the apparel goods shipped by Baum. The UCC, however, allows a buyer to reject goods "if the goods or the tender of delivery fail in any respect to conform to the contract." Utah Code Ann. § 70A-2-601. The evidence at trial was uncontroverted that the apparel goods shipped by Baum

were not as had been represented to Knight by Baum's sales representative, Mark Grayson. The goods were not of a "Norma Kamali" or "fleece wear" style, as had been represented, (Tr. 81-82), and could not have been marketed in the area in which Knight sells apparel goods because they were unattractive and not aesthetically satisfactory. (Tr. 64-65, 71-72, 85, 106-07.) On that basis, Knight was entitled to reject the goods because they did not conform with the representations made regarding the goods and upon which Knight relied in making the decision to purchase them.

The fact that the sale may not have been a "sale on approval" as that term is defined in Utah Code Ann. § 70A-2-326(1), did not limit Knight's right to reject the goods as non conforming under section 70A-2-601. In point of fact, Knight testified, and his testimony was unrebutted, that it is the standard practice in the wholesale apparel industry for wholesalers who purchase goods sight unseen to be able to return the goods if they are unsatisfactory. (Tr. 90.) The uncontroverted evidence demonstrated that, when a company purchases wholesale apparel goods that are not as represented or are unsaleable, the company will return the goods to the manufacturer, making arrangements through the manufacturer's representative. (Tr. 78-79.) Under Utah Code Ann. § 70A-1-205(3), this usage of trade should have been considered

by the court to give particular meaning to and supplement or qualify the terms of the agreement between the parties in the present case. The lower court was further statutorily obligated under the section 70A-1-205(4) to construe the terms of the agreement between the parties as consistent with the usage of trade. Baum's brief completely ignores the argument that the evidence of the usage of trade, which was unrebutted, should have been considered by the court in construing the agreement between Baum and Knight. Had the court properly considered evidence of the usage of trade and construed the usage as consistent with the agreement, Knight would have been entitled to a ruling that he properly rejected Baum's unsaleable goods by giving notice to Baum's representative, Mark Grayson.

II.

MARK GRAYSON WAS AN AGENT OF BAUM.

In contending that Mark Grayson was not an agent of Baum, Baum neglects several crucial facts that were shown by unrebutted evidence at trial which demonstrate that Grayson was Baum's agent. The court committed error in not so finding. It was uncontroverted that Baum and Grayson met with each other at Baum's place of business in New York City and that Baum authorized Grayson to call Knight on the telephone to see if he would be interested in purchasing Baum's apparel goods. (Tr.

39-40.) It was further uncontroverted that Baum agreed to pay Grayson a commission equal to $1.00 per garment item, in return for which Grayson was to arrange the sale of Baum's goods. (Tr. 37-39.) The sale was negotiated by Grayson, acting on Baum's behalf. (Tr. 83.) Grayson acknowledged in his testimony that he was a sales representative for Baum. (Grayson deposition, 66.) The lower court found that Grayson signed the purchase order for Knight. There was absolutely no evidence at the trial, however, that Grayson was authorized to sign for Knight or to bind Knight to the terms contained in the document. Knight's testimony to the contrary was unrebutted. (Tr. 81,91.)

In Knight's business as an apparel wholesaler, he had dealt with numerous sales representatives in hundreds of prior transactions. (Tr. 76.) In virtually each such purchase transaction, Knight dealt with the sales representative in making arrangements to purchase goods from a manufacturer. Whenever goods were delivered that were unsaleable, Knight would contact the sales representative to arrange to have the goods returned to the manufacturer. (Tr. 76-77.) On discovering the unmarketable quality of Baum's goods, Knight did as typically had done, he contacted Mark Grayson, Baum's representative, to make arrangements to have the goods returned. In his brief, Baum ignores the crucial nature of the

relationship he had with Grayson. There was ample evidence of consent on the part of Baum that Grayson act on his behalf and so because Baum's agent. Indeed, there was no evidence to the contrary. In authorizing Grayson to solicit Knight, Baum also gave Grayson authority such as sales representatives in the apparel industry are typically given--the authority to continue to deal with a buyer and to receive notices of rejection. Knight was entitled to rely on this authority in communicating with Grayson and informing him he was rejecting the goods because of their poor quality.

Grayson was empowered with the same authority with which manufacturer's representatives are typically empowered in the industry. Knight acted in this case as he had in hundreds of other such transactions and as other wholesalers generally act--he notified the manufacturer's representative of the rejection and asked for instructions. Knight followed all of Grayson's instructions and returned the goods when Grayson supplied Baum's address. The lower court committed reversable error in holding that Kight's notice to Grayson was not notice to Baum of the rejection of the goods.

CONCLUSION

The lower court erred in holding Knight liable. As argued above, Knight was entitled to reject Baum's nonconforming goods and was further entitled to give notice of the rejection to Mark Grayson, Baum's representative. The lower court should be reversed.

DATED this 4th day of December, 1985.

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CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the within and foregoing Reply Brief to be mailed, postage prepaid, this 4th day of December, 1985, to the following:

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