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COURT OF APPEALS

STATE OF NEW YORK

WILLIAM J. JENACK ESTATE APPRAISERS
AND AUCTIONEERS, INC.,
Appellant,

-against-

No. 229

RABIZADEH,

Respondent.

20 Eagle Street
Albany, New York 12207
November 13, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 229, William J.
2 Jenack Estate Appraisers.

3 Counsel, do you want any rebuttal time?

4 MR. OSTRER: Yes, Your Honor, three
5 minutes, please.

6 CHIEF JUDGE LIPPMAN: Three minutes. Sure,
7 go ahead.

8 MR. OSTRER: Your Honors, may it please the
9 court, my name is Benjamin Ostrer. I'm here on
10 behalf of William Jenack Estate Appraisers.

11 CHIEF JUDGE LIPPMAN: Counselor, why - - -
12 why shouldn't we comply or be consistent with the
13 plain language of the statute of frauds?

14 MR. OSTRER: Your Honor, in 5-701 - - -

15 CHIEF JUDGE LIPPMAN: Yeah.

16 MR. OSTRER: - - - it permits - - - it
17 distinguishes between the name of the purchaser - - -

18 CHIEF JUDGE LIPPMAN: Right.

19 MR. OSTRER: - - - and the person or the
20 name of the party responsible. Going back to the
21 Hicks v. Whitmore case, which - - -

22 CHIEF JUDGE LIPPMAN: Why shouldn't we have
23 both of those names?

24 MR. OSTRER: Well, Your Honor, in the - - -

25 CHIEF JUDGE LIPPMAN: If that's what the

1 statute of frauds - - -

2 MR. OSTRER: Your Honor - - -

3 CHIEF JUDGE LIPPMAN: - - - requires?

4 MR. OSTRER: - - - I don't believe that

5 that's what the statute requires. The language is

6 identical as requirement number 4 in Hicks v.

7 Whitmore that the name of the person on whose account

8 the sale was made appear.

9 CHIEF JUDGE LIPPMAN: Well, it says - - -

10 MR. OSTRER: Jenack Auctioneers does

11 appear.

12 CHIEF JUDGE LIPPMAN: - - - the person - -

13 - doesn't that case say that the person on the

14 account is not necessarily the owner? In other

15 words, does that case really stand for the

16 proposition that you're - - -

17 MR. OSTRER: Yes, it does, Your Honor. I

18 believe that the responsible party - - -

19 JUDGE SMITH: So you're saying - - - you're

20 saying the auctioneer is the person on whose account

21 the sale - - -

22 MR. OSTRER: He is. It's his resale

23 certificate. He's collecting the sales tax. He's

24 the one who's responsible. He pled - - -

25 JUDGE SMITH: And because - - - and because

1 his name is there, that's fine?

2 MR. OSTRER: Your Honor, and we pled in our
3 complaint that we were the agent for an undisclosed
4 principal.

5 JUDGE SMITH: But when did - - - when, for
6 the first time, did you make the argument you must
7 made?

8 MR. OSTRER: Your Honor, we made it in our
9 complaint. We said it at the Appellate Division that
10 we were the party-at-interest. The resale
11 certificate, which is included in the record, has our
12 name on it. We're the person collecting the sales
13 tax. We clearly can sue in our name. The case law
14 provides that we are the party-at-interest who's
15 capable of being the plaintiff in the action.

16 CHIEF JUDGE LIPPMAN: Are you arguing that
17 this is custom and usage makes it okay? Or are you
18 arguing you're really the party-at-interest?

19 MR. OSTRER: Your Honor, I am - - - my
20 client is the party-at-interest. It is custom and
21 usage. But it draws from the statutory provisions
22 that were in effect when Hicks v. Whitmore was
23 decided in 1834. That identical language appears
24 today in - - -

25 JUDGE GRAFFEO: Why is it - - -

1 MR. OSTRER: - - - 5-701.

2 JUDGE GRAFFEO: Why is this the way the
3 custom and usage has worked out as opposed to having
4 - - -

5 MR. OSTRER: Well, the clerking - - -

6 JUDGE GRAFFEO: - - - following a little
7 more closely the general obligations law?

8 MR. OSTRER: Well, Your Honor, the clerking
9 sheet is really a document of the auctioneer's use.
10 It's not a public document. If the auctioneer were
11 to write in shorthand or to write in a foreign
12 language or to use abbreviations or a surname or a
13 nickname, he puts down Yogi instead of Lawrence Peter
14 Berra, is that name satisfactory? It needs to be
15 decipherable by the auctioneer.

16 Now, the auctioneer is the party-at-
17 interest. If we have to go to the point where the -
18 - - it's going to be required that the name appear, I
19 think however the name is inserted, it needs to be
20 decipherable by the auctioneer.

21 JUDGE ABDUS-SALAAM: So, counselor - - -

22 MR. OSTRER: There's no requirement that we
23 can't use short - - -

24 JUDGE ABDUS-SALAAM: So counsel - - -

25 MR. OSTRER: - - - hand.

1 JUDGE ABDUS-SALAAM: Counsel - - -

2 MR. OSTRER: Yes, Your Honor.

3 JUDGE ABDUS-SALAAM: - - - if the - - - so
4 if the clerk sheets only had numbers and didn't have
5 the auctioneer's name at the top, would that be a
6 different case than this?

7 MR. OSTRER: Well, the Appellate Division
8 distinguished because they found that there was
9 another writing under the Crabtree doctrine, that
10 could be read with the clerking sheets to supply us
11 with the purchaser's name. They said that there
12 wasn't such a document in connection with the
13 consignor. But there's a distinction. And that
14 distinction is in 5-701 where it says it's not the
15 original consignor, it's the person on whose account
16 the sale was made, which is the auctioneer.

17 So we don't need to get to the second
18 point, although I think we prevail on that point too.

19 JUDGE RIVERA: Is - - -

20 MR. OSTRER: Because the number is
21 shorthand for the cons - - - for the auctioneer.
22 It's decipherable by the auctioneer.

23 JUDGE RIVERA: And is the auctioneer's name
24 on every single one of those clerk's sheets?

25 MR. OSTRER: Yes, it is.

1 JUDGE RIVERA: Okay. So if you had the
2 auctioneer's name - - - let's say you have a clerk
3 sheet that has the auctioneer's name and another
4 name. I assume your position is going to be the
5 other name is then divulging the seller?

6 MR. OSTRER: It - - -

7 JUDGE RIVERA: Because in this case, you've
8 got a number and you've got you. How do we know
9 which one applies?

10 MR. OSTRER: Your Honor, it's - - - there
11 can be additional information. But the clerking
12 sheet is not a public document. It's utilized by the
13 auctioneer. It dates back to the days when they
14 brought their goat to the town square - - -

15 JUDGE RIVERA: I understand. But you're
16 using it to - - -

17 MR. OSTRER: - - - and they needed to
18 record - - -

19 JUDGE RIVERA: - - - satisfy the statute of
20 frauds. So my question is, what happens when you
21 have the auctioneer's name and you've got what
22 obviously is supposed to be what you're calling this
23 indication of the seller, albeit in this case, it's a
24 - - - it's numerical; it's a number.

25 MR. OSTRER: Yes, Your Honor.

1 JUDGE RIVERA: But you say you get to
2 choose and say - - -

3 MR. OSTRER: Let - - -

4 JUDGE RIVERA: - - - the name that
5 satisfies the statute of frauds is the auctioneer's
6 name, not - - -

7 MR. OSTRER: Is the auctioneer's - - -

8 JUDGE RIVERA: - - - the seller.

9 MR. OSTRER: - - - name. The number that
10 appears is for the benefit of the auctioneer's use.
11 He's recording data.

12 JUDGE SMITH: But would - - -

13 MR. OSTRER: Matters trav - - - the auction
14 pace is rather expedient. Yes, Judge?

15 JUDGE SMITH: If you had the sell - - -
16 unlikely, but suppose you had the seller's name but
17 not the auctioneer's would that be good enough?

18 MR. OSTRER: Yes, Your Honor.

19 JUDGE SMITH: You get your - - - basically
20 you can have either the principal or the agent there,
21 and you say either one satisfies the statute?

22 MR. OSTRER: Yes, I believe so, Your Honor.
23 The same way I could desc - - - I don't have to be an
24 agent for an undisclosed principal. I can disclose
25 my principal. And the statute of frauds provides

1 that principal and agent law remains under Section
2 1-102.

3 JUDGE RIVERA: And on the clerk's sheet
4 that has the auctioneer's name - - - because you say
5 it's on every single one of these clerk sheets - - -

6 MR. OSTRER: Yeah, right at the top.

7 JUDGE RIVERA: - - - but that actually
8 reveals, using Judge Smith's example - - - reveals
9 the name of the seller, then it's the name of the
10 seller that satisfies?

11 MR. OSTRER: Well, that's - - -

12 JUDGE RIVERA: Because you are now
13 revealing that person?

14 MR. OSTRER: If - - -

15 JUDGE RIVERA: You've disclosed that
16 person.

17 MR. OSTRER: - - - what Judge - - -

18 JUDGE RIVERA: The auctioneer's no longer
19 the agent.

20 MR. OSTRER: Judge Smith's question was, if
21 the name was - - - if the auctioneer's name did not
22 appear, but the original consignor's name did appear,
23 would that satisfy? I believe if both names appear,
24 clearly the statute's satisfied.

25 JUDGE SMITH: If both names appear, you've

1 satisfied it twice?

2 MR. OSTRER: Yes, Your Honor.

3 JUDGE RIVERA: If it's one or the other?

4 JUDGE PIGOTT: If the first person who
5 bought, you know, whatever you're auctioning, wanted
6 to - - - didn't get what he bargained for, he would
7 be suing for it, right?

8 MR. OSTRER: Your Honor, he could - - - his
9 contract was enforceable. Because under 2-328, at
10 the fall of the hammer, it's his.

11 JUDGE PIGOTT: He could come after you?

12 MR. OSTRER: He would sue the auctioneer.

13 JUDGE PIGOTT: So is this a case where he
14 had - - - he had the right to sue you if you didn't
15 deliver it. You delivered it, and he's saying I
16 don't have to pay you because the name of the owner
17 isn't on this document?

18 MR. OSTRER: Because I believe that the
19 defendant misread the obligations of the auctioneer.
20 And the trial court got it right. We were reversed
21 by a - - - I think, an overly strict reading of
22 5-701.

23 JUDGE PIGOTT: Is this standard in the
24 industry? I think it's a silly question, but I - - -
25 this is what everybody does, I take it?

1 MR. OSTRER: The amicus says that this is
2 what everybody does. In fact, nobody requires
3 anybody to bid at an auction.

4 CHIEF JUDGE LIPPMAN: Yeah, yeah, but does
5 that - - -

6 MR. OSTRER: If you require the name of the
7 - - -

8 CHIEF JUDGE LIPPMAN: Counsel - - -

9 MR. OSTRER: - - - consignor it may - - -

10 CHIEF JUDGE LIPPMAN: Counsel?

11 MR. OSTRER: Yes, Your Honor.

12 CHIEF JUDGE LIPPMAN: But if the - - - if
13 the GOL requires you to have it, it doesn't really
14 matter that it's the standard of the industry, does
15 it?

16 MR. OSTRER: But the GOL doesn't require
17 it, Your Honor. And the GOL has - - -

18 CHIEF JUDGE LIPPMAN: Well, that's why
19 we're here for. I understand that.

20 MR. OSTRER: Well, the GOL - - - it didn't
21 require - - - the predecessor statute, which employs
22 the identical language, was interpreted by the Hicks
23 court to read that the legislature intended it not be
24 necessary to insert the name of the real owner.
25 That's been our law.

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
2 hear from your adversary, and then you'll have your
3 rebuttal.

4 MR. WINOKUR: May it please the court. My
5 name is Michael S. Winokur. I represent the
6 respondent in this case.

7 CHIEF JUDGE LIPPMAN: Counsel, what's wrong
8 with just having the name of the auctioneer on there?

9 MR. WINOKUR: Well, I think in every
10 auction, there is an auctioneer. As a matter of
11 fact, it says he's the auctioneer. It doesn't say
12 that he's the person who's even doing the sale. He's
13 just listed as auctioneers. And every - - - every
14 auction has an auctioneer.

15 But the idea of the statute is that the
16 name of the person on whose behalf the sale is made
17 should appear in the sale book. And - - -

18 JUDGE SMITH: And to you, that means the
19 consignor?

20 MR. WINOKUR: That means the consignor.

21 JUDGE SMITH: But didn't the Hicks court
22 seem to think otherwise? That was back a long time
23 ago.

24 MR. WINOKUR: It did say that the consignor
25 was the one whose name had to appear. But you did

1 not the name - - - require the name of each owner.
2 The item in that case was owned by several people in
3 Hicks.

4 JUDGE SMITH: But didn't - - - didn't they
5 say that the agent would - - - was good enough?

6 MR. WINOKUR: They said the agent. But I
7 don't believe the agent is the - - - is the agent of
8 the seller, as far as being the person who's - - - on
9 whose account it's made. He's simply charged with
10 selling the property.

11 JUDGE ABDUS-SALAAM: But what if - - - what
12 if the owner of the property had consigned it to the
13 auctioneer to sell?

14 MR. WINOKUR: But that's not the case here.

15 JUDGE ABDUS-SALAAM: Do we know that that's
16 - - - do we know if that's true?

17 MR. WINOKUR: But in our case here, we have
18 a number that identifies the person on whose behalf
19 it's made. And that number is not the auctioneer - -
20 -

21 JUDGE ABDUS-SALAAM: What if the - - -

22 MR. WINOKUR: - - - but somebody else.

23 JUDGE ABDUS-SALAAM: - - - consignor - - -
24 okay, assume the consignor is a separate person from
25 the auctioneer - - -

1 MR. WINOKUR: Right.

2 JUDGE ABDUS-SALAAM: - - - but the
3 consignor then appoints the auctioneer as its agent.

4 MR. WINOKUR: But we don't have anything
5 that - - - over here, that he - - - that the - - -
6 that he is the agent. There's nothing in the record
7 - - -

8 JUDGE PIGOTT: Why does that hurt you?

9 JUDGE RIVERA: But that's what he asserts.

10 MR. WINOKUR: He asserts it, but it's not
11 in the record.

12 JUDGE PIGOTT: But why does that hurt you?
13 In other words, you want to buy this thing. You bid
14 on it. You win it. And he's saying, here's your - -
15 - here's what you won. And you're saying, wait a
16 minute, I don't know who you are. Well, of course
17 you know who it is. And I'm missing why there's a
18 flaw in this.

19 MR. WINOKUR: I don't believe that the
20 knowledge of who it - - - that you simply get the
21 item is relevant. I think the relevant factor, when
22 it comes to the statute of frauds is that the statute
23 be complied with.

24 JUDGE PIGOTT: Well, let's say - - - let's
25 say you have an estate sale. I don't know how these

1 things work. But let's say, you know, somebody dies,
2 and they're going to sell all the - - - all the
3 estate stuff in the house and everything. Is it your
4 - - - is it your argument that every sale that's
5 made, if it's only in the name of the auctioneer, is
6 in violation of the statute of frauds and each one
7 can be set aside?

8 MR. WINOKUR: If it's - - - if there's no
9 writing by the party who's buying it with all the
10 terms of the sale, as required by the UCC, then the
11 sale book should contain the name of the estate as
12 the seller or the executor or administrator of the
13 estate.

14 JUDGE PIGOTT: So they're all - - - they're
15 all void - - - they're voidable, I should - - -

16 MR. WINOKUR: I didn't say they're all
17 void.

18 JUDGE PIGOTT: - - - say.

19 MR. WINOKUR: Maybe they very well put them
20 in. This is the estate of so-and-so. I don't know
21 how it's done in the business. But they should be
22 done in conformity with the statute. And the mere
23 fact that it may be expedient does not make it
24 justifiable to violate the statute that was enacted
25 by the legislature.

1 JUDGE PIGOTT: Don't you want this thing?
2 I thought you - - - I thought you bid 400 grand for
3 it?

4 MR. WINOKUR: No, we didn't buy it.
5 Obviously we didn't buy it here. Obviously if we
6 wanted it, it would never have been an issue. There
7 are cases where - - -

8 JUDGE PIGOTT: Well, yes, there was - - -

9 MR. WINOKUR: - - - in that case the - - -

10 JUDGE PIGOTT: - - - well, wait a minute;
11 wait a minute; wait a minute. Let's suppose - - -
12 let's suppose you go and you say, no, give me my
13 thing, and he says, hey, I'm sorry, I just noticed I
14 violated the statute of frauds. Take your check,
15 tear it up, and we're going to - - - we're going to
16 resell it next week. You'd be pretty darn upset.

17 MR. WINOKUR: Well, that may be. But
18 that's not the case here. Here's the - - - here's
19 the person who has - - -

20 JUDGE ABDUS-SALAAM: If we decide in your
21 favor, counsel, aren't we opening the door for such a
22 thing? Wouldn't the auctioneers decide maybe they'd
23 like to sell it for a higher price, whereas the
24 bidder maybe had buyer's remorse and didn't want to
25 buy it, which - - -

1 MR. WINOKUR: Well - - -

2 JUDGE ABDUS-SALAAM: - - - which sounds
3 like the case to me here. But if we decide in your
4 favor, it seems that we could be letting the
5 auctioneer void any sales to people who legitimately
6 want to buy, because they could get a higher price.

7 MR. WINOKUR: Your Honor, under the
8 statute, the par - - - the names of both parties are
9 supposed to appear - - - appear in the sale book.
10 This is a - - - this is an exception to the usual
11 statute of frauds in the UCC that gives a certain
12 amount of liberalization to be able to do this,
13 provided the names - - -

14 JUDGE SMITH: You keep saying - - -

15 MR. WINOKUR: - - - of both parties appear.

16 JUDGE SMITH: - - - you keep saying the
17 statute says that. But the Hicks case says it should
18 be sufficient to insert the name of any person having
19 legal authority to sell. Why doesn't that mean the
20 that name William J. - - -

21 MR. WINOKUR: I - - -

22 JUDGE SMITH: - - - Jenack isn't good - - -
23 is good enough?

24 MR. WINOKUR: Because in any - - - in any
25 auction the auctioneer would have the authority to

1 conduct the auction. But I believe that would be - -
2 - but it has to be the person who gave it to the
3 auctioneer, has to be in. I think that's the meaning
4 of it. Otherwise the entire - - - the entire GOL
5 requirement is a dead letter.

6 JUDGE PIGOTT: Would this be a surprise to
7 Christie's or, you know, the big auction houses in
8 New York? I mean, are they in trouble if we - - - if
9 we agree with the Appellate Division here?

10 MR. WINOKUR: I don't think they're - - - I
11 don't think they're in trouble. First of all, it
12 only requires that the name of the consignor be in
13 the sale book, it doesn't require that it be read
14 publicly. It doesn't even require that it be on the
15 same page. It merely requires that it appear in the
16 sale book.

17 CHIEF JUDGE LIPPMAN: So your - - - your
18 argument is, if - - - if we uphold what was done here
19 that you'd never have a consignor's name. It would
20 basically always be the auctioneer?

21 MR. WINOKUR: No, the consignor's name, if
22 it was done like in the Appellate Division decided,
23 the consignor's name should be somewhere in the sale
24 book.

25 CHIEF JUDGE LIPPMAN: Right. But - - - but

1 if we uphold them, then it would always be the
2 auctioneer, and from a policy perspective, why is
3 that bad?

4 MR. WINOKUR: Well, I think, first of all,
5 I think - - -

6 CHIEF JUDGE LIPPMAN: And why is it
7 inconsistent with the purpose behind the statute of
8 frauds?

9 MR. WINOKUR: I think it's very important,
10 because first of all, it provides some record of
11 where the item being auctioned came from. You don't
12 want somebody selling something - - -

13 JUDGE ABDUS-SALAAM: You're saying - - -

14 MR. WINOKUR: - - - stolen.

15 JUDGE ABDUS-SALAAM: You're saying it has
16 to be in the sales book?

17 MR. WINOKUR: In the sale book.

18 JUDGE ABDUS-SALAAM: But what if - - - what
19 if, as this auctioneer, has numbers, but they have
20 another sheet of papers somewhere else that
21 identifies the consignor? Would that work?

22 MR. WINOKUR: I - - - I don't believe
23 that's good. It's supposed to be in the sale - - -

24 JUDGE ABDUS-SALAAM: It's got to be in - - -

25 -

1 MR. WINOKUR: - - - book.

2 JUDGE ABDUS-SALAAM: - - - sale book.

3 MR. WINOKUR: The Appellate Division
4 limited its decision to say - - -

5 JUDGE ABDUS-SALAAM: The statute of frauds
6 says it has to be in the sales book?

7 MR. WINOKUR: That's what the - - - that's
8 what the GOL says.

9 JUDGE GRAFFEO: I thought - - -

10 MR. WINOKUR: However - - -

11 JUDGE GRAFFEO: I thought you can use a
12 number of documents to satisfy - - -

13 MR. WINOKUR: That's where there's a signed
14 writing that refers specifically to the other
15 documents. There is no signed writing here.

16 JUDGE GRAFFEO: I'm looking at something
17 called the "absentee bid form" that's at page 57 of
18 the appendix.

19 MR. WINOKUR: Yes, it is, Your Honor. But
20 it does not contain the terms of the sale.

21 JUDGE GRAFFEO: What - - - does this have
22 no relevance to this issue?

23 MR. WINOKUR: I think it has no relevance
24 at all, because it's not a writing signed that says
25 the price of the - - -

1 JUDGE GRAFFEO: But there's a signature - -
2 -

3 MR. WINOKUR: - - - item that's sold.

4 JUDGE GRAFFEO: - - - down here at the
5 bottom.

6 MR. WINOKUR: Yeah, but it's not a
7 signature that says that I am bound to buy this
8 property at any particular price. It does not
9 contain the essential terms of the transaction.

10 JUDGE GRAFFEO: No, but it identifies who
11 bidder - - -

12 MR. WINOKUR: Identifies my client.

13 JUDGE GRAFFEO: - - - number 305 was.

14 MR. WINOKUR: Absolutely. Absolutely. But
15 that's not a notification of a contract.

16 JUDGE RIVERA: But don't you have
17 correspondence afterwards, asking for invoices,
18 asking for information - - -

19 MR. WINOKUR: We have nothing signed by the
20 - - -

21 JUDGE RIVERA: - - - about how to do the
22 wiring?

23 MR. WINOKUR: - - - there was nothing
24 signed - - -

25 JUDGE RIVERA: Wiring the funds?

1 MR. WINOKUR: - - - nothing signed by the
2 respondent.

3 JUDGE ABDUS-SALAAM: Well, at any auction,
4 counsel, are you ever going to know the actual price
5 until the hammer falls?

6 MR. WINOKUR: Absolutely not. That's why
7 the names of both parties must be in the sale book,
8 as opposed to a usual writing signed by both parties,
9 or at least by the party to be charged.

10 JUDGE PIGOTT: Is this curable?

11 MR. WINOKUR: I don't think so.

12 JUDGE PIGOTT: Why?

13 MR. WINOKUR: Because it's not in the sale
14 book.

15 JUDGE PIGOTT: Well, of course - - - I
16 mean, that's why it'd have to be cured - - -

17 MR. WINOKUR: It's a violation of the
18 statute.

19 JUDGE PIGOTT: Wait a minute. Wait a
20 minute. If you're right, it's not in the sale book -
21 - - I'm just saying, if you're right, I'll sign it
22 now.

23 MR. WINOKUR: All right. I think I mean,
24 the whole issue could have been avoided by requiring
25 that something be signed immediately following the

1 auction.

2 JUDGE PIGOTT: But is that a yes that it
3 could be cured so - - -

4 MR. WINOKUR: No. In other words, if
5 there's a signed writing, then we would not apply the
6 exception to the UCC, we'd apply the usual UCC rule
7 that the party to be signed - - - to be charged has
8 to sign the agreement. They could have a terms of
9 sale with a bid, like on a real estate auction, and
10 have the buyer - - -

11 JUDGE ABDUS-SALAAM: But isn't the party to
12 the - - -

13 MR. WINOKUR: - - - or someone who appoints
14 - - -

15 JUDGE ABDUS-SALAAM: Counsel - - -

16 JUDGE GRAFFEO: Aren't some of these people
17 in foreign countries? I mean, they're all around the
18 world.

19 MR. WINOKUR: They can appoint an agent in
20 New York to sign it. With modern communication, they
21 could probably communicate by e-mail or whatever to -
22 - - would sign it and send it over. It doesn't
23 prevent it from - - -

24 JUDGE ABDUS-SALAAM: Isn't the party to - -
25 -

1 MR. WINOKUR: - - - being done.

2 JUDGE ABDUS-SALAAM: - - - be charged in
3 this case your client, the bidder?

4 MR. WINOKUR: The defendant is the party to
5 be charged in any case.

6 JUDGE ABDUS-SALAAM: Well, you keep saying
7 it's got to be signed by the party to be charged - -
8 -

9 MR. WINOKUR: Party to be charged. That's
10 the statute.

11 JUDGE ABDUS-SALAAM: Didn't your - - -
12 didn't your - - -

13 MR. WINOKUR: On the - - -

14 JUDGE ABDUS-SALAAM: - - - client sign the
15 absentee bid form - - -

16 MR. WINOKUR: But that's not a contract.

17 JUDGE ABDUS-SALAAM: - - - Judge Graffeo
18 asked about?

19 MR. WINOKUR: That is not a contract. That
20 merely says I'm interested in bidding, here's who I
21 am. That's all it says. It doesn't say I've agreed
22 to purchase it for 400,000 dollars.

23 JUDGE RIVERA: Okay. So even if you don't
24 think the post-auction correspondence from your - - -
25 excuse me - - - from your client satisfies the

1 signature requirement, are you telling me you don't
2 think it satisfies the requirement - - -

3 MR. WINOKUR: But - - -

4 JUDGE RIVERA: - - - of iden - - - excuse
5 me - - - of identifying the name of the purchaser?

6 MR. WINOKUR: No, we're talking about the
7 seller right now.

8 JUDGE RIVERA: No, no, but I'm asking about
9 the purchaser.

10 MR. WINOKUR: The Appellate Division said
11 that the name of the purchaser could be separate,
12 because it was in the record. So that they - - -
13 that was what - - - they went on a very narrow - - -
14 on a very narrow ruling. But I'm saying that in
15 general, the course - - - basically it should have
16 been in the - - - it should have been in the sale
17 book anyway.

18 JUDGE RIVERA: I know. But is your
19 position that - - -

20 MR. WINOKUR: But there's no - - -

21 JUDGE RIVERA: Excuse me. Is your position
22 that that is incorrect? That you cannot - - - the
23 only way you can satisfy the General Obligation Law,
24 is by these names in the memo?

25 MR. WINOKUR: Or something signed by the -

1 - -

2 JUDGE RIVERA: In the book or in the
3 clerk's sheet?

4 MR. WINOKUR: - - - the parties. Or if my
5 client had signed it. He didn't sign anything after
6 that.

7 JUDGE SMITH: So you agree, there are two
8 possible ways to satisfy the statute of frauds: one
9 by an entry in the sale book, and you say this entry
10 doesn't do it - - -

11 MR. WINOKUR: Right.

12 JUDGE SMITH: - - - or by a writing signed
13 by your client, and you say this form doesn't do it.

14 MR. WINOKUR: Exactly.

15 JUDGE SMITH: And the form doesn't do it
16 because not all the terms are in there. But why
17 can't you put the other documents together with that
18 piece of paper?

19 MR. WINOKUR: What other documents? The
20 price is not there. You can't sign something before
21 and put the price in later.

22 JUDGE SMITH: The price - - - the price is
23 in the sale book, isn't it?

24 MR. WINOKUR: No. It's in the sale book,
25 but that happened after the signature. It's not

1 referring to something that existed before.

2 JUDGE SMITH: Is that - - - maybe I'm
3 wrong, but can't you take - - - if you've got a
4 signed writing which has terms missing, can't you use
5 other documents to - - - to fill in the missing
6 terms, as long as it's clear that they relate to the
7 same transaction?

8 MR. WINOKUR: Not essential terms, Your
9 Honor. This is not a signature. In other words, we
10 had - - - if we had - - - if there was a separate
11 document, you may bid for me up to 400,000 dollars,
12 and you have this, then that would be different.
13 That would be signed - - - that would be an
14 authorization. This - - - there is no po - - - there
15 was nothing signed by the respondent here after the -
16 - - after the sales price.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.
18 Thanks.

19 Counselor, rebuttal?

20 MR. OSTRER: Yes, Your Honor. Well, with
21 respect, Your Honor, to your question, I believe the
22 price was supplied by the purchaser. It was his bid
23 that filled out the contract that was drawn from - -
24 -

25 JUDGE SMITH: Well, but you - - -

1 MR. OSTRER: - - - the absentee bid form.

2 JUDGE SMITH: - - - you don't need just the
3 price, you need a piece of paper that has the price
4 in it.

5 MR. OSTRER: Well, we - - - Your Honor, in
6 the affidavit submitted by my client on the summary
7 judgment motion, he advised the court of the price,
8 that there was an audio and video of the auction,
9 which would document the - - - the sale price.

10 JUDGE SMITH: Was that - - -

11 MR. OSTRER: However, we also have a
12 written document, as - - - of the bill. The
13 purchaser does not reject saying I did not make that
14 bid. If the purchaser had said immediately following
15 the auction, that's not - - -

16 JUDGE SMITH: Yeah. You have a very strong
17 - - -

18 MR. OSTRER: - - - my bid - - -

19 JUDGE SMITH: - - - you have a very strong
20 case on the equities. I mean, obviously, a lot of
21 fairness is on your side. But you still - - - the
22 statute of frauds has a lot of inequity. You've
23 still got to have - - - you can have all the
24 videotape you want, you still got to have a signed
25 writing, don't you?

1 MR. OSTRER: The - - -

2 JUDGE SMITH: Or an entry in the auction
3 book.

4 MR. OSTRER: Well, Your Honor, 2-201 says
5 because a term is missing, does not invalidate the
6 contract. And we're able to produce that term from
7 other documents. We issued an invoice. That invoice
8 was not rejected because that wasn't my bid. We had
9 no communication from the purchaser saying the
10 400,000 dollars was inaccurate.

11 So he's bid over the phone. He's applied
12 to bid over the phone. He's listed the items he's
13 going to bid for over the phone. And he's signed the
14 bid form. He's accepted the terms and conditions of
15 sale. He supplied the final bid, so he supplied the
16 price. And we've documented the price back to him
17 without any word to the contrary.

18 For him to say there's no price because the
19 price wasn't - - - we know in the auction setting the
20 price is going to be found when the hammer falls.
21 And that became the enforceable contract that the
22 court - - - it is enforceable on the part of the
23 purchaser.

24 Your Honor - - -

25 JUDGE SMITH: If I'm understanding what you

1 just said, that's an alternative argument. You're
2 saying that the bid form signed is an enforceable
3 contract, and the missing terms can be supplied from
4 other documents, and you wouldn't even - - - and you
5 don't even have to rely on the statute, the special
6 auction statute.

7 MR. OSTRER: Yes, sir. Thank you, Your
8 Honor.

9 CHIEF JUDGE LIPPMAN: Okay. Thank you
10 both.

11 MR. WINOKUR: Thank you, Your Honor.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of William J. Jenack Estate Appraisers And Auctioneers, Inc. v. Rabizadeh, No. 229 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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