

H&H Bus. Express Inc. v Brooks

2010 NY Slip Op 30932(U)

April 1, 2010

Sup Ct, Nassau County

Docket Number: 15419/07

Judge: Michele M. Woodard

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SCAN

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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H&H BUSINESS EXPRESS INC.,

Plaintiff,

-against-

MICHELE M. WOODARD

J.S.C.

TRIAL/IAS Part 12

Index No.: 15419/07

REGINALD BROOKS d/b/a PHOTOGRAPHIC
SERVICES and REGINALD BROOKS,

Defendants.

DECISION AFTER TRIAL

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This is a breach of contract case involving Plaintiff H&H Business Express, Inc. ("H&H") and Defendants Reginald Brooks d/b/a Photographic Services, and Reginald Brooks, individually. H&H seeks damages for the alleged failure of the Defendants to deliver a working commercial photographic machine for which Plaintiff paid a \$20,000.00 deposit. The Defendants contend that there was no breach and that, in any event, Plaintiff bought the machinery from Web Photos Inc. ("Web Photos") and Mr. Brooks and his company were merely brokers, not responsible for the damages claimed. The Plaintiff called Mr. Hai-Shon Liu to testify on its behalf. Reginald Brooks, the sole proprietor for Photographic Services, testified for the Defendants. Numerous documents were submitted by both parties in support of their positions.

H&H does business as a photographic distribution company in New York. It deals with photo labs and wedding processing shops. Mr. Liu testified that he specifically ordered a DKS "750" photographic because of the speed of that model. He stated he agreed to pay \$35,000.00 to Mr. Brooks, not Web Photos. He understood that Mr. Brooks would buy the machine from Web Photos. Based upon a written agreement he paid \$20,000.00 to Mr. Brooks as a deposit. He testified that, instead of delivering a 750 model, a "550" machine was delivered, that was obsolete. He further testified that

despite numerous repairs, the machine never worked and that it remains to this day on his premises.

He said he entrusted Mr. Fred E. Revaz of Digital Portal, the manufacturer of the machine to preview the machine's specifications and operating functions before he signed a purchase agreement with Photographic Services. He also said that because H&H was purchasing the equipment from Photographic Services, not Web Photos, a prior owner of the equipment, he wanted to make sure that there were no liens or similar problems involving the machine before he signed the Agreement to purchase it Photographic Services.

Mr. Brooks testified that both he and Mr. Liu participated in drafting the Agreement and he admitted that the equipment needed parts and repairs before Mr. Revaz could verify that the equipment was operational and met the specifications under that Agreement. He also concedes that he never held himself out as a broker during the transaction, despite his claim that he is not liable for the damages caused by the Plaintiff based upon his status as a broker in the deal.

Defendant's Exhibit A consists of a letter from Daniel J. Pohl of Web Photos which is undated. It was provided to establish, for Mr. Brook's benefit, that the intended photographic machine had "no liens, lenses [sic] [leases] or other payments associated with the equipment." A second undated letter from Web Photo authorizes the Defendants to sell the equipment in question and "pay for the equipment through Photographic Services and Reggie Brooks." They were briefly shown to Mr. Liu at the time of the signing of the sales agreement between H&H and Photographic Services.

Defendant's Exhibit D to supports both parties' allegations that prior to signing the Agreement the correct machine was previewed by Mr. Revaz, a specialist from Digital Portal, Inc., sent by the Plaintiff to inspect the machine at the Web Photos' facility in Washington, D.C., prior to purchase but that it was inoperable upon installation at H&H. This undated unsworn letter from Mr. Revaz states "the DKS Printer was told to be a DKS - 750. Upon vision, you cannot dispute the output of the

printer.” The letter of Mr. Revaz goes on to report that after the delivery to H&H, he encountered “major installation placement problems,” including temperature changes and instability of the equipment where it was installed on Plaintiff’s floor. However, he also stated, “[E]ach problem was fixed by Digital Portal Inc. service personal][sic] paid by Mr. Brooks” and that, “at the completion of the service from Digital Portal Inc., the DKS was completely operational.”

The evidence submitted also includes a photograph of the delivered equipment dated and time “12.18.2008 09:45.” The photograph shows a desktop type computer monitor with a touch screen control, instead of a keyboard on the equipment which contains no visible model number. Another exhibit is a brochure quality photograph of a machine with a scanner designated as a model DKS 750S. The reverse of that brochure indicates, *inter alia*, “1560 scanned images/hour.” A poorly photocopied page of the exhibit shows four different photographic machines indicating the model numbers, “DKS 1500”, “DKS 750”, “DKS550C” and “Station Lab Pac.”, respectively (Def. Ex. B). Full color brochures of each referenced model plus model DKS 750S, with various photographs and descriptions of the machines, were also submitted into evidence. A comparison of the photographs supports the Plaintiff’s position the machine model delivered to H&H was not as specified in the Agreement.

Plaintiff’s Exhibit 2 entitled, “Agreement Between H&H Business Express & Photographic Services” is dated September 21, 2004. Under the Agreement, Defendant Photographic Services was responsible for locating the shipping company, “making all [delivery] arrangements including proper packaging and insurance against any damages.” It also provided that the Defendant was to “pay for the up and running and operational when the machine is installed . . .”, and that “Photographic Services agrees to take a deposit of twenty thousand dollars (\$20,000.00). The balance of fifteen thousand (\$15,000.00) will be paid fifteen (15) days after delivery and/or the machines are running and operational and Fred Revaz, the sales rep. from Digital Portal, will sign off on the approval of

operation.” The Agreement was signed by Reginald Brooks and Hai-Shon Liu, H&H Business Express, Inc. on September 21, 2004.

Plaintiff Exhibit 7 is a Photographic Services Invoice establishing the purchase price as \$35,000.00 and that a check numbered 4523 was accepted by the Defendant as payment for the \$20,000 deposit. The Invoice states, among other things that, “Photographic Service is not responsible for delays due to shipping, as the title for the equipment transfers to the buyer at the time of shipment by Photographic Services.” The Invoice contains the signature of Reginald Brooks as “Seller” and is dated September 21, 2004. The Invoice references the “additional agreement,” submitted as Plaintiff’s Exhibit 2 above. Also attached is a bill of lading from Atlas Van Lines indicating Defendant Photographic Services as the customer, Web Photo, as the shipper, and H&H Business Services, Inc. as the consignee with delivery effectuated on October 6, 2004.

Plaintiff’s Exhibit 4 is a fax cover sheet to Reginald Brooks and an Invoice from Daniel J. Pohl indicating Reginald Brooks, as customer, dated September 21, 2004 for the sale of a “Digital KIS System 750 series” with KIS AKS 32 FP Film Processor for a sales price of \$16,000.00. There is no indication on the Invoice that the machine was to be sold by Daniel J. Pohl or Web Photos to H&H. A check was submitted establishing that Reginald Brooks paid \$16,000.00 to Web Photos for the machine on or about September 29, 2004 (Def. Ex. B). Notably, Defendant’s Exhibit B is a cancelled bank check for \$16,000.00 written out to Daniel J. Pohl of Web Photos with the remitter of the check identified as “Photographic Services.”

Plaintiff submitted Exhibit 1, is a Photographic Services business card given to Mr. Liu by Reginald Brooks. The card states:

“We Buy & Sell
Minilab Equipment, Professional
Lab Equipment & Photographic Supplies”

Nowhere on the card does it indicate that the Defendants acted as “brokers.” Additionally, Plaintiff’s Exhibit 5, an email sent by “Reggie,” to Mr. Liu on September 30, 2005, was submitted to support the Plaintiff’s position on the defective inoperable condition of the subject machinery. This email establishes that the Defendant and Digital Portal worked for weeks after the delivery of the equipment requiring the ordering of new parts to be shipped to the Plaintiff on October 3, 2005. Specifically it stated

Since Portal assured me that there will be no problems with this machine after these new up to date items are installed, it is important that we put chemistry in the machine prior to the Technicians’ arrival. I have invested a lot of money in this machine, and I hope you decide[s] to kee[p] it or if you can assist me in selling it I will appreciate it.

(Plaintiff’s Ex. 5).

The exhibit also includes an email dated November 29, 2004, from Digital Portal employee, Fred Revaz, substantiating that the equipment delivered was a DKS 650 rather than the 750 S model agreed upon and that it would cost an estimated \$6400 in labor and parts for the service of the machine. Notably, it also says,

“[t]hese items are required to get the project going and needed to see if anything further is in need of replacement or repairing. These items may not be all that is needed.”

(Ex.5).

All of the credible testimony and documentary evidence establishes that the subject machinery was sold by Web Photos to Reginald Brooks as Photographic Services for \$16,000.00 and simultaneously sold by Reginald Brooks as Photographic Services to H&H for \$35,000.00. The Court particularly credits Mr. Liu’s testimony that the machinery was never operable as intended and failed to meet the specifications promised by the Defendants. A breach of an agreement exists where the items purchased are inoperable or not the items bargained for by the parties to an agreement.

Despite Mr. Revaz’s unsworn statement to the contrary, the Court credits Mr. Liu’s testimony

and the documentary evidence that through no fault of the Plaintiff, the equipment delivered was not what he bargained for and that to date, it is not operational.

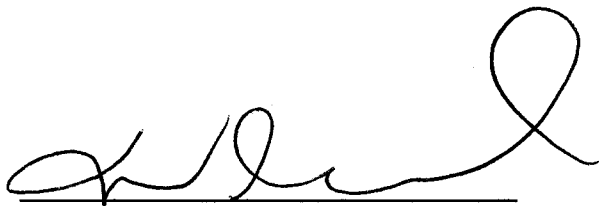
The Defendants' claim that they were merely brokers to the subject transaction is not borne out by the evidence. The only mention of a broker relationship was after the sale, at which time Mr. Brooks conceded that he was trying to sell the machine to other customers in addition to brokers. (Ex. 5). It is quite evident that Mr. Brooks purchased the subject machinery from Web Photo, the manufacturer, and then simultaneously sold it to the Plaintiff for over twice the original purchase price. As the "seller," Mr. Brooks agreed to bear the responsibility for the installation and set up of the machinery, with the balance of sale price due to his company once Mr. Revaz verified that the machinery was up and running.

Based on the foregoing, the Court finds that there was a breach of the contract between H&H and Photographic Services, that Mr. Brooks, as the principal and sole proprietor of Photographic Services is personally liable to the Plaintiff in the amount of \$20,000.00, the amount paid for the machine, with interest to accrue from the date of the completion of trial on January 25, 2010. Upon ten (10) days written notice given by the Defendants, the Plaintiff must make the subject machinery available for pick-up by the Defendants within fifteen (15) days after receipt of payment of the full judgment as provided for in this Decision. The failure of the Defendants to retrieve the machinery, at no costs to the Plaintiff, will result in a forfeiture of the machinery.

Settled Judgment on Notice.

DATED: April 1, 2010
Mineola, N.Y. 11501

ENTER:



**HON. MICHELE M. WOODARD
J.S.C.**

ENTERED
APR 13 2010
**NASSAU COUNTY
COUNTY CLERK'S OFFICE**