
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	
GREGORY MYRICK)	Adversary Proceeding
(Chapter 7 Case <u>93-40749</u>))	Number <u>94-4064</u>
)	
<i>Debtor</i>)	
)	
)	
)	
GREGORY MYRICK)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
KENNICKELL PRINTING)	
COMPANY)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

Trial of the above-captioned case was conducted on December 1, 1994.
After considering the evidence, I make the following Findings of Fact and Conclusions of
Law.

FINDINGS OF FACT

Debtor, Gregory Myrick ("Myrick"), is a Savannah artist who has had a business relationship with the Defendant, Kennickell Printing Company ("Kennickell"), for over ten years. In the course of their business relationship, Myrick employed Kennickell Printing to produce fine art prints from his original paintings. Since 1984, Kennickell has produced prints from at least 44 individual original paintings. Myrick sells the prints to the general public as a means of maintaining his livelihood.

Debtor's Chapter 13 case was filed on May 5, 1993. Shortly after the filing of his case, Myrick filed an adversary proceeding styled Gregory Myrick v. Kennickell Printing Co., Adversary Proceeding No. 93-4100, alleging that the Defendant had in its possession 44 "color separations" in which the Debtor claimed an ownership interest and with respect to which he demanded turnover. Defendant did not file an answer within the time required by law, and on August 11, 1994, I entered an Order directing the Clerk to enter default judgment and requiring the Defendant to turnover and account for all 44 color separations. Default was later set aside, and the case was ultimately dismissed because Defendant complied with the August 11 Order and no monetary relief was sought in that case. In this adversary proceeding, the Debtor alleges that 19 of the 44 color separations were never turned over to him because the Defendant had disposed of them prior to the date of the entry of that order. Debtor therefore seeks to recover damages for the loss of those separations.

It is stipulated that the total cost to reproduce the 19 color separations is \$8,317.82. The "color separations" referred to in this proceeding can perhaps best be understood as consisting of four color negatives made from an original work of art. When the four separations are superimposed, the image creates a full color positive image which is used to create a printer's plate from which the prints can be stamped onto high quality paper and ultimately sold to the public.

It is stipulated that at one time Defendant was in possession of 44 sets of color separations, each set being utilized for the purpose of creating original prints. It is further stipulated that these color separations were, for the most part, stored at the premises of Kennickell Printing and, as demand for Myrick's prints dictated, he would reorder additional runs of prints in order to replenish his inventory for sale to the general public. It was understood that none of Myrick's prints were limited editions, and thus it was clear to both parties that, to the extent demand dictated, he would continue from time-to-time to reorder them, generally in quantities of 1,000.

It is further stipulated that 19 sets of the color separations were disposed of by Kennickell Printing presumably when it was clearing out its warehouse. This disposal or destruction of these 19 sets of separations occurred without any notice to Debtor.

Debtor generally dealt with Mickey Minnick, a former salesman who worked at Kennickell Printing. He would bring original paintings in and Minnick would

provide him with a quote to produce 1,000 prints. While the price would vary slightly from time-to-time, generally it cost the Debtor \$500.00 more for the initial run of 1,000 prints than it did for subsequent runs. The reason that it was cheaper to produce the prints on subsequent occasions, according to both Myrick and Minnick, was that it was not necessary to reproduce the color separations everytime a run of prints was ordered; the separations created for the first order could simply be reused. For a time, the color separations were actually produced by a third party, Savannah Color Separations, Inc., and a number of invoices were introduced indicating that color separations from original art were produced at a cost of approximately \$500.00 per original print. *See Exhibit P-1.* This work was requested by Kennickell Printing, was billed to Kennickell, paid for by Kennickell and was incorporated into Kennickell's quote for the first run of prints it produced for Myrick. Sometime in approximately 1986, Kennickell obtained the equipment to do the color separation work in house and ceased subcontracting this portion of the print job to Savannah Color Separations, Inc. Nevertheless, the same approximate differential in cost continued to exist between the first run and subsequent runs.

Mr. Myrick contends that he understood from conversations with Kennickell representatives, and from the course of dealing between the parties, that the color separations belonged to him, that he had paid for them in the sense that he had been charged extra for the first run of prints and that he could remove them into his possession at any time. However, he testified that Kennickell suggested that the separations be left on their premises for safekeeping and to make it more convenient for him to order additional runs of prints.

Kennickell does not deny that it was in fact a matter of convenience to them and helped them competitively to maintain the separations at their location, but denies that Myrick was ever told that he owned the separations. Myrick testified that on a couple of occasions he was actually given physical possession of color separations, but that for convenience he ultimately returned them to Kennickell. Kennickell's witnesses were not certain that that had happened, but could not specifically deny that it had. I therefore conclude that on more than one occasion, Myrick had taken temporary possession of the separations.

Mr. Myrick contends that he paid in cash for most, if not all, of the work he ordered from Kennickell, and that, while he was given a cash receipt for the money he paid, he was never given any form of contract governing the rights and obligations of the parties. Kennickell, on the other hand, contends that on at least three or four occasions it did deliver to him a form on Kennickell's letterhead entitled "Quotation." *See* Exhibit D-1. The only Quotation introduced into evidence, however, was blank. Kennickell did not produce a single document indicating that Myrick had been quoted a job on such a form. Moreover, it is uncontradicted that Myrick never signed any written contract.

The reverse side of the Quotation contains a number of so-called "Printing Trade Customs." Paragraph 6 of those printing trade customs reads as follows:

Preparatory Materials. Working mechanical art, type, negatives, positives, flats, plates, and other items when supplied by the printer, shall remain his exclusive property unless otherwise agreed in writing.

Kennickell contends that the language of paragraph 6 is broad enough to include color separations and that there is no written agreement which would vest title to the color separations in Myrick as required by paragraph 6. Myrick contends that this form never became a part of the contract between the parties because he never received one, never signed one, and never discussed the terms of paragraph 6 with any representative of Kennickell. Myrick also points out that paragraph 15 of those same customs reads as follows:

Customer Furnished Materials. Paper stock, inks, camera copy, film, color separations, and other customer-furnished material shall be manufactured, packed and delivered to the printers specifications. Additional cost due to delays or impaired production caused by specification deficiencies shall be charged to customer. (Emphasis supplied).

Clearly the term "color separations" is mentioned in paragraph 15 but not in paragraph 6. Myrick contends that his ownership rights in the color separations is evidenced by the fact that he paid extra for them on the initial run, that the language of paragraph 6, even if binding, is insufficient to include the separations which are clearly delineated in paragraph 15, and that his rights were infringed upon when he was not notified of their imminent destruction. Kennickell concedes that, had the color separations been paid for directly by Myrick from a third party and physically delivered by Myrick to Kennickell's premises, they would have considered those separations to be Myrick's. Kennickell also concedes that the

separations have no value to Kennickell because they can be used only to reproduce copyrighted material which is the right of Myrick alone and that the only reason for maintaining them was for the mutual convenience of the parties. Nevertheless, Kennickell contends that, even though it passed the cost along to Mr. Myrick by virtue of its practice of charging for the full cost of the separations out of the first run of prints, Myrick acquired no ownership interest in them because Kennickell ordered and made the initial payment for the separations.

Al Kennickell, Jr., president of the Defendant, testified that within the industry "everything used to make the final product belongs to the printer." He kept separations of Mr. Myrick and other artists on file as well as the material used to perform other print jobs for numerous other customers, but that from time-to-time when the company's storage space was exhausted, the company would go through the materials in storage and decide what should be discarded. He indicated that the only criteria followed was that Kennickell would keep separations in its possession if it believed that it had an "ongoing business relationship" with the client, and denied the allegation that the separations were destroyed because Myrick filed Chapter 13 while owing Kennickell money.

CONCLUSIONS OF LAW

_____The Court is faced with conflicting testimony as to who, between Myrick and Kennickell, owned the missing color separations. Each party was apparently laboring

under the belief that it owned the separations. After considering all of the surrounding circumstances, the Court finds that Myrick was the true owner of the color separations, and that Kennickell held these separations in bailment for Myrick. This conclusion is supported by the course of dealing between the parties, particularly the fact that Myrick was required to pay Kennickell for the entire cost of the color separations on the first run, as well as the fact that Myrick had copyrighted his art work and Kennickell could derive no benefit from owning the color separations inasmuch as they could not be used without the express permission of Myrick.

O.C.G.A. section 44-12-40 provides:

A bailment is a delivery of goods or property upon a contract, express or implied, to carry out the execution of a special object beneficial either to the bailor or bailee or both and to dispose of the property in conformity with the purpose of the trust.

"An essential element of the bailor-bailee relationship is the actual or constructive delivery of property to the bailee who thereby acquires independent and temporarily exclusive possession of the delivered property. A bailee acquires no title in the property he holds as bailee. His interest is limited to a right of possession for which he may maintain an action if this right is impaired." In re National Buy-Rite, Inc., 11 B.R. 196, 198 (Bankr. N.D.Ga. 1981) (citations omitted).

It is clear that there was an entrusting of goods for the mutual benefit of the parties, and I conclude that a bailor-bailee relationship was therefore created. I base this conclusion on the totality of the circumstances regarding the course of dealing between the parties. Specifically, the Debtor was charged for the entire cost of producing these separations when they were created. Had he purchased them from an outside source and brought them to Kennickell, he would have been charged the same amount on a first run as he was on the second and subsequent runs and Kennickell would concede that he owned the separations. Further, Kennickell made no claim of ownership in the sense that they did not charge him a royalty or any similar charge for the second run on account of their rights in those color separations. Clearly, had Debtor purchased the color separations from a third party and then delivered them to Kennickell, the separations would have to be considered the property of the Debtor. I can see no reason for reaching a different conclusion where the Debtor bore all costs associated with their production up-front. In other words, the economic cost and all the benefits of the the separations flowed directly to the Debtor and that is a clear incident of ownership, notwithstanding Kennickell's mere possessory intent.

Finally, even though there is no evidence that the quotation form that was introduced contains the precise language in 1994 that it did throughout the period of time that the parties were interacting, to the extent that it might be inferred, color separations are not listed in paragraph 6 as the kind of assets which remain the exclusive property of the printer, and in fact, they are specifically outlined by name in paragraph 15. Therefore, I am unwilling to infer that for the purposes of printing trade customs the color separations are

encompassed within the more general terms "working mechanical art, type, negatives, positives, flats, plates and other items" supplied by the printer.¹

Under O.C.G.A. section 44-12-43, "[a]ll bailees are required to exercise care and diligence to protect the thing bailed and to keep it safe." This provision obligates a bailee "to take good care of the thing borrowed, to use it according to the intention of the bailor, and to restore it at the proper condition." Industrial Lumber Co., v. Strickland, 71 Ga. App. 298, 30 S.E.2d 792 (1944). There is absolutely no question that Defendant's actions in destroying Debtor's color separations without notice to Debtor violates Defendant's duty of care under Section 44-12-43. Accordingly, judgment will be entered in Debtor's favor in the amount of \$8,317.82.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Plaintiff/Debtor have judgment over and against Defendant, Kennickell Printing Company, in the amount of \$8,317.82.

Lamar W. Davis, Jr.

¹ See e.g., Gram Corp. v. Wilkinson, 210 Ga. App. 680, 437 S.E.2d 341 (1993) (any ambiguity in contract must be construed against party that prepared it).

United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of December, 1994.