

EXAMINER'S ANALYSIS OF QUESTION NO. 5

Analysis of Sasha's sale of the painting to Brandon is prompted by consideration only of the uniform commercial code (UCC) adopted in Michigan. MCL 440.1101 et seq. Article 2 of the UCC involves sales and generally applies to "transactions in goods." MCL 440.2102. According to the statutory definition, "[g]oods means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid" MCL 440.2105(1).

Generally, a buyer has three options with respect to transactions in goods under the UCC. The buyer may accept the goods; reject the goods; or revoke an acceptance of the goods. MCL 440.2606 and 440.2607; MCL 440.2602; and MCL 440.2608, respectively. See also, *Bev Smith, Inc v Atwell*, 301 Mich App 670, 684 (2013). The UCC provides in pertinent part that revocation of acceptance of the goods is legally justified where there is a nonconformity with respect to the goods that "substantially impairs its value to [the buyer] if he accepted it . . . without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances." MCL 440.2608(1)(b). The UCC further mandates that:

Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it. MCL 440.2608(2).

Express warranties can be created by the seller of goods by any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain. MCL 440.2313(a).

Remedies for recovery of damages are available to a buyer under the UCC for a seller's breach of the contract. MCL 440.2701 et seq.

The UCC applies to the sale of the painting in the instant case, as it is a transaction in goods. The fact that the sale was consummated between two private art collectors and would probably not be considered commercial in nature, does not negate application of the UCC. See, *Bev Smith, Inc.* at 682, citing *Wilson v Hammer*

Holdings, Inc, 850 F2d 3, 4-6 (CA 1, 1988). Brandon clearly accepted the painting by taking possession of it, retained possession of it for four years, and is now attempting to revoke his acceptance. The issue now is whether Brandon's revocation of acceptance is either legally legitimate or wrongful under the UCC.

The four-year passage of time between consummation of the sale and notice of revocation of acceptance of the painting is significant. A strong argument could be made that Brandon waited too long, without legal justification, to revoke acceptance of the goods under the UCC, and therefore cannot recover any damages against Sasha. Brandon himself inspected the painting before purchase. Nothing in the facts suggests that Brandon was not at liberty to have a professional appraisal performed before and even immediately after the sale, which would have certainly revealed the inauthenticity of the piece. The facts indicate that the nonconformity was easily discoverable at least to a trained professional eye, and for an investment of \$20,000, it would have been prudent for Brandon to secure an appraisal much earlier. Moreover, there is no evidence of fraud by Sasha who had also relied on the certificate of authenticity that accompanied the work. Thus, a four-year delay in seeking an appraisal and actually discovering the nonconformity and notifying Sasha is unreasonable and does not constitute a legally justified revocation of Brandon's acceptance under the UCC.

On the other hand, a perhaps less compelling argument could be made that Sasha's provision of a certificate of authenticity to Brandon constituted an assurance by her as the seller that the painting was authentic. Both Brandon and Sasha were seasoned art collectors at the time and did not discover or even suspect that the artwork was not an original Josh Landing piece. In fact, Brandon sought appraisal of the piece, not to verify authenticity, but to assess any appreciation in value. Thus, Brandon had no reason to discover the nonconformance earlier. Once it was actually discovered, Brandon immediately notified Sasha. If that argument is convincing, Brandon may be able to legally revoke acceptance of the painting and recover damages from Sasha.

Brandon could also seek damages based on Sasha's breach of warranty because the painting does not conform to the affirmation or promise provided in the certificate of authenticity that accompanied the sale of the painting. MCL 400.2313(a). Arguments regarding other warranties, such as implied warranty of merchantability under MCL 440.2314, would not be applicable here because Sasha is a private art collector, not a merchant.