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UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

In re RICHARD WALTER SIMMS,
Debtor

In Chapter 7 proceedings
Case No. 07-1002

DAVID BIRDSELL,
Chapter 7 Trustee,
Plaintiff,

Adversary 08-112

v.

UNDER ADVISEMENT DECISION RE
TURNOVER

MICHELE LEAD MAY & JOHN
SCHLESSELMAN
d/b/a/ INNOVATIVE
CONCEPTZ/POSH NM,
Defendants.

I. Introduction and Background¹

Tony Hillerman and Michael McGarrity grace the cover of Posh New Mexico’s Fall/Holiday 2006 issue. Inside is an interview with the two legendary New Mexican writers. The publishers, Michele May and John Schlesselman, together dba Innovative Conceptz/Posh NM (collectively “Publishers”) anxiously await the arrival of the magazines from the manufacturer as this is Posh’s first widely distributed issue. However, their moods sour as they learn the manufacturer shipped the magazines on shrink wrapped pallets instead of boxes causing extensive damage. When they unwrap the pallets, they see that, beyond the scuffing from shipping, several copies of the magazine were bound incorrectly. In the end almost all copies of Posh are scuffed, bound incorrectly or both. Instead of being the high end product they had expected and demanded, Posh turns out to be an inferior product.

Mr. Schlesselman immediately demands a reprint of Posh. However, the printer refuses

¹ This memorandum decision constitutes the Court’s findings of fact and conclusions of law required under Rule 7052.

1 leaving the Publishers with a dilemma: 1) have new copies of Posh NM printed by another
2 company, causing their time sensitive product to be severely late or 2) ship the inferior product thus
3 avoiding the breach of contract suits that their advertisers would surely initiate following a late
4 shipped magazine. The Publishers choose the latter. As a result, the Publishers do not pay their
5 printers the outstanding account balance of roughly \$25,000. The Court must decide if the
6 Publishers properly rejected the magazines and if their refusal to pay was justified.

7 **II. Facts**

8 The Publishers are the founders, editors, sales force, and publishers of Posh New Mexico
9 Magazine (“Posh”). Posh is designed as a high quality magazine, targeting New Mexicans with six
10 figure incomes and above. Unable to print Posh on their own, the Publishers retained Southwest
11 Lithographics (“Southwest”) as their printer in July 2005 (“Contract”). In turn, Southwest
12 subcontracted the actual manufacturing of the magazine to Publication Printers, Inc.

13 The Publishers released the first issue of Posh in April 2006. Mr. Schlesselman testified that
14 the April issue was unsatisfactory with defective binders and magazine covers. In response,
15 Southwest made a substantial adjustment to the Publishers’ bill.

16 The release of the October issue of Posh was extremely important to the Publishers
17 personally, professionally and economically. Though the Publishers already released the April
18 issue, the October issue was the first wide scale release of Posh. To avoid the problems experienced
19 with the April issue, the Publishers paid an extra \$1,000 to have the magazine box shipped from
20 Publication Printers. Leading up to the printing of the October issue, the Publishers had several
21 conversations with Southwest stressing the necessity of a high quality product.

22 Under terms of the Contract, Southwest, via Publication Printers, shipped 31,500 copies of
23 the October issue to the Publishers. The total bill for the run was almost \$50,000, of which the
24 Publishers paid \$25,000 in advance.

25 The product was a disaster. Publication Printers did not box ship the magazines, but instead
26 shipped them on pallets. According to Mr. Schlesselman’s uncontroverted testimony, almost all of
27 the 31,500 copies had binding issues, cover issues or both. Upon receipt, Mr. Schlesselman
28

1 immediately reported the problem to Richard Simms, Debtor and sole shareholder of Southwest
2 Lithographics. According to Mr. Simms' testimony, he advised Mr. Schlesselman to report the
3 problem to Publication Printers. Following Mr. Simms' instructions, Mr. Schlesselman contacted
4 Publication Printers, demanding that it reprint and reship the magazines. Publication Printers
5 refused citing the lack of a contract between itself and the Publishers. Opening his door to an
6 inspection, Mr. Schlesselman again demanded that Southwest reprint and reship the October issue.
7 Mr. Simms responded by offering an adjustment to the bill if the Publishers paid the outstanding
8 balance owed. Neither Southwest nor Publication Printers demanded an inspection or offered to
9 replace the magazine.

10 Because Southwest and Publication Printers refused to reprint the magazines, the Publishers
11 shipped the products on hand avoiding potential breach of contract suits. According to Mr.
12 Schlesselman's testimony, due to the poor quality of the October issue, the Publishers suffered
13 \$45,000 in damages due to lost advertising revenue. The Publishers, after already paying \$25,000
14 to print the magazines, refused to pay the remaining \$25,000 due under the Contract.

15 Southwest filed suit in New Mexico State Court for the unpaid balance and the Publishers
16 countersued for damages. On the eve of trial, the Debtor filed for bankruptcy on March 9, 2007.
17 The bankruptcy stayed the state court action because the Debtor is the sole shareholder of
18 Southwest. The Debtor did not list the Publishers in his original schedules and statements or master
19 mailing list.

20 Based on the Trustee's motion, the Court entered an order consolidating Southwest with the
21 Debtor's estate.² Soon after consolidation, the Trustee filed this adversary proceeding demanding
22 turnover of the \$25,000 account balance under §542. The Trustee claims that the Publishers never
23 effectively rejected the shipment under the UCC and therefore, regardless of the quality, the balance
24 due is still outstanding and can be collected by the Trustee. Further, the Trustee argues, the
25 Publishers were unjustly enriched because they retained the magazines without paying.

26 ² Though the motion was noticed, the Court notes that the Trustee did not notice the order granting the motion to
27 consolidate. As part of the motion, the Trustee consented to the lifting of the stay so that the New Mexico state court
28 case could proceed. There is no indication that the Trustee advised the Publishers that the stay had been lifted so that
they could have proceeded in New Mexico state court where an action was already pending.

1 The Court tried the matter on December 16, 2008 at which time Mr. Simms, Mr.
2 Schlesselman and Ms. May testified. The matter was taken under advisement at the conclusion of
3 the trial.

4 Ultimately the Court must decide if the Publishers effectively rejected the shipment under
5 the UCC. Because the Court finds that the Publishers did reject the shipment, the Court grants
6 judgment against the plaintiff trustee.

7 **III. Analysis**

8 *A. Acceptance under the UCC.*

9 It is uncontested that this matter involves the sale of goods and is therefore governed by the
10 Section 2 of the Uniform Commercial Code (“UCC”).³ The Trustee bears the burden of proof in this
11 matter and must show:

- 12 (1) the acceptance of the goods by the buyer;
- 13 (2) the price of the goods accepted;
- 14 (3) the past due date of the price; and
- 15 (4) the failure of the buyer to pay.

16 67A Am. Jur. 2d, Sales § 1029 (2008). To prevail in this matter the Trustee must show that the
17 Publishers accepted the goods. The Trustee has not done so. The testimony shows that the
18 Publishers did not accept the magazines and in fact rejected them.

19 Acceptance of goods occurs when the buyer:

- 20 1. After a reasonable opportunity to inspect the goods signifies to the seller that the
21 goods are conforming or that he will take or retain them in spite of their non-
22 conformity; or
- 23 2. Fails to make an effective rejection (subsection A of § 47-2602), but such
24 acceptance does not occur until the buyer has had a reasonable opportunity to inspect
25 them; or
- 26 3. Does any act inconsistent with the seller's ownership; but if such act is wrongful
27 as against the seller it is an acceptance only if ratified by him.

28 A.R.S. §47-2606(A). Here, the Trustee failed to demonstrate any of the forms of acceptance.

The Publishers immediately notified Southwest that the magazines were scuffed, had binder
problems or both. This does not signify to Southwest that the goods are conforming as required
under Section 2606(A)(1). Instead, Mr. Schlesselman demanded that Southwest reprint and reship

³ Southwest is an Arizona company and the Publishers are based in New Mexico. Neither party makes a choice of law
argument. Upon review the UCC Sections cited read substantially the same under Arizona and New Mexico law. *See*
A.R.S. § 47-2101 *et seq.* and N.M. Stat. Ann § 55-2-601 *et seq.* The Court will cite to Arizona statutes.

1 the magazines. When Mr. Simms told him that he could keep the magazines and an adjustment to
2 the bill would be made, Mr. Schlesselman refused the offer. In essence, he told Southwest that the
3 Publishers *would not* retain the goods in spite of the non-conformity.

4 Under the UCC “if the goods or the tender of delivery fail in any respect to conform to the
5 contract, the buyer may: 1. Reject the whole; or 2. Accept the whole; or 3. Accept any commercial
6 unit or units and reject the rest.” A.R.S. §47-2601. Rejection must be made within a reasonable
7 time. A.R.S. § 47-2602(A). Here, immediately upon learning of the problems, Mr. Schlesselman
8 contacted both Southwest and Publication Printers identifying the production problems and
9 demanding reshipment. The Publishers timely rejected the entire shipment as required under
10 Sections 2606(A)(2) and 2602(A).

11 The Trustee argues that by distributing Posh the Publishers did an act inconsistent with
12 ownership. The Trustee is incorrect. Under the UCC the:

13 buyer is under a duty after rejection of goods in his possession or control to follow
14 any reasonable instructions received from the seller with respect to the goods and in
15 the absence of such instructions to make reasonable efforts to sell them for the
16 seller's account if they are perishable or threaten to decline in value speedily.
17 A.R.S. §47-2603(A).

18 Southwest gave two instructions upon rejection. The first – contact Publication Printers.
19 The Publishers followed this instruction, going as far as FedExing an example of the damaged goods
20 to Publication Printers. But, Publication Printers advised the Publishers that only Southwest could
21 authorize a reprinting. The Publishers followed this reasonable instruction and again contacted
22 Southwest.

23 The second instruction – send us the money and we’ll figure out an adjustment - is
24 unreasonable. Here, all parties involved knew the time sensitive nature of the product, if not timely
25 shipped, severe breach of contract claims could be brought against the Publishers, as well as the
26 importance of manufacturing a high quality product. Demanding payment and a possible credit in
27 lieu of reshipment is an unreasonable instruction under the circumstances.

28 Section 47-2603(A) authorizes the sale of the goods if “they are perishable or threaten to
decline in value speedily.” Due to the time sensitive nature of the product, if the magazines were

1 not distributed by the Publishers, they would be worthless. Here, while the Publishers did not
2 technically “sell” the products as they are distributed free to selected households, distribution is the
3 equivalent of a sale. Posh only has value to the consumers and advertisers when it is timely
4 distributed. By distributing the magazines, the Publishers effectively mitigated their damages,
5 fulfilling the purpose behind Section 47-2603(A). Thus, lacking reasonable instructions from
6 Southwest, the Publishers distributed the magazines as allowed under Section 47-2603(A).

7 The Publishers acted in good faith after rejecting the goods. In complying with Section 2603,
8 “the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor
9 conversion nor the basis of an action for damages.” A.R.S. §47-2603(C). The Publishers had little
10 choice but to ship the goods on hand. Had they waited for a replacement printing run, the Publishers
11 likely would have suffered more than the \$45,000 in claimed damages.⁴

12 The Trustee has failed to meet his burden of proof. The Publishers did not accept the goods
13 and, instead, rejected them.

14 *B. Unjust Enrichment*

15 To show unjust enrichment in Arizona, “a plaintiff must establish that, (1) plaintiff conferred
16 a benefit upon the defendant; (2) defendant's benefit is at plaintiff's expense; and (3) it would be
17 unjust to allow defendant to keep the benefit.” *USLife Title Co. of Arizona v. Gutkin*, 732 P.2d 579,
18 584 (Ariz.App. 1986).⁵ All three elements are required. *Id.* Here, the Trustee fails under prong
19 three. As discussed above, the Publishers had ample justification for distributing the magazines
20 without paying the balance due. It would be unjust to rule in the Trustee’s favor.

21 **IV. Conclusion**

22 Based on the foregoing relief is denied on the Trustee’s complaint. Counsel for Trustee is
23 to upload a form of order.

24 ⁴ Even if Trustee showed acceptance was, buyers are entitled to incidental and consequential damages for seller’s breach.
25 A.R.S. 47-2715. Here, the Court determines that Southwest breached the Contract. As such, the Publishers would be
entitled to offset any amount due on the Contract.

26 ⁵ The standard in New Mexico, while slightly different, also requires a showing that it would unjust to allow the
27 defendant to keep the benefit. To prevail on a claim of unjust enrichment, “one must show that: (1) another has been
knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be
unjust.” *Ontiveros Insulation Co., Inc. v. Sanchez*, 3 P.3d 695, 698 (N.M.App., 2000). Here the Trustee fails under
28 prong two. Here, the Trustee fails under prong two.

1
2 So ordered.

3 **DATED:** March 24, 2009.

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5 
6 CHARLES G. CASE II
7 UNITED STATES BANKRUPTCY JUDGE

8 Copy of the foregoing sent via facsimile and/or mailed to:

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