

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: March 7, 2001

GSBCA 15396-TD

SIMON TOLEDANO,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Simon Toledano, pro se, Brooklyn, NY.

Christopher P. Veith, Office of Chief Counsel, United States Customs Service,
Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK, HYATT, and DeGRAFF.**

DeGRAFF, Board Judge.

Appellant contracted to purchase property from the agency, but did not take delivery of the property within the time required by the sale contract. According to the terms of the contract, the agency is entitled to retain appellant's payment.

Findings of Fact

On December 16, 1999, the United States Customs Service (Customs), a component of the Department of the Treasury, held a sale of seized property and other merchandise in Edison, New Jersey. The rules that governed the sale were set out in a sale catalog, which explained that Treasury's sales agent was EG&G Technical Services. Lot number 210 listed in the sale catalog was described as eighty-eight cartons of sweaters for "export only." The sale catalog explained that goods identified as "export only" could not be entered into the commerce of the United States and had to be removed from the country no later than February 21, 2000. If such goods were not removed by that date, the purchaser would be deemed to be in default, title to the goods would revert to the Government, and the purchaser would forfeit any money paid for the goods. The catalog stated more than once that there were no exceptions to the requirements imposed upon "export only" goods. They had to be promptly exported and could not be returned to the United States under any circumstances. Exhibit 1.

The sale catalog also explained that a purchaser of "export only" goods had to meet certain licensing and federal permit requirements before the goods would be released for export. The catalog stated that some export requirements were complex, and suggested that if purchasers of "export only" goods were not familiar with all of the requirements imposed upon exported goods, they should engage the services of a broker, bonded carrier, or other professional who was familiar with those requirements. Exhibit 1.

Simon Toledano attended the sale and purchased lot number 210 for \$8250. Exhibit 3. Mr. Toledano arranged for a broker to remove the goods from EG&G's warehouse. Exhibit 4.

Mr. Toledano's broker did not remove the goods in lot number 210 from EG&G's warehouse by the February 21 deadline set out in the sale catalog. Exhibit 16. In an April 12, 2000 letter to Customs, Mr. Toledano said that his broker made several attempts to contact EG&G and found EG&G to be uncooperative. Mr. Toledano said that his broker sent a truck to remove the goods, "albeit 2 days late," and EG&G refused to release them. Mr. Toledano said that EG&G caused the delay in removing the goods, and asked that Customs turn the goods over to him instead of deciding that he had forfeited his payment. Exhibit 4.

Customs treated Mr. Toledano's April 12, 2000 letter as a claim and a request for a contracting officer's decision. On June 9, 2000, the contracting officer decided that because Mr. Toledano had not complied with the terms and conditions of the sale, he had defaulted on his obligations and was not entitled either to retrieve the goods or to receive a refund of the purchase price. Exhibit 10.

In his appeal to the Board, Mr. Toledano said that his broker was "unable to communicate" with EG&G to remove the goods from the warehouse by February 21. He also said that his broker sent a truck to the warehouse a few times and, each time, EG&G stated that there was missing paperwork and refused to allow the broker to remove the goods. Mr. Toledano also said that it is unfair for Customs to retain his payment. Letter from Simon

Toledano to the Board (Aug. 14, 2000).¹ The parties agreed to submit this appeal to the Board for a decision based upon the written record. Rule 111.

In a December 20, 2000 letter to Mr. Toledano, his broker said that he sent a truck to EG&G's warehouse three times and that EG&G refused to release the goods because the deadline for removal had passed. Mr. Toledano's broker said that he did not (and does not) know the removal deadline. Although the broker did not state the dates that he sent a truck to the warehouse, he said that he did so after getting an immediate export form approved by Customs. The immediate export form is dated February 25, 2000, and was approved by Customs on February 28, 2000. Exhibit 16. In a January 31, 2001 affidavit, EG&G's Director of Risk Management stated that EG&G's warehouse personnel did not have any contact with Mr. Toledano's broker or any of his representatives regarding lot number 210 until after February 21, 2000. Exhibit 18. The affidavit is consistent with a series of e-mail exchanges among EG&G personnel and with correspondence between EG&G and the Customs contracting officer in April 2000. Exhibit 8.

Customs eventually sold the goods in lot number 210. The net revenue to the Government, after deducting sales, storage, and other expenses, was \$527.03. Exhibit 15.

Discussion

Mr. Toledano's contract required him to remove the "export only" goods in lot number 210 from the United States no later than February 21, 2000, and his failure to do so was a breach of his contract with Customs. Mr. Toledano says that his breach should be excused because EG&G, Customs's sales agent, interfered with his broker's efforts to remove the goods. He also says that it is unfair for Customs to retain his payment.

Mr. Toledano's breach should not be excused because the evidence does not establish that EG&G interfered with his broker's efforts to remove the goods in lot number 210 by the February 21 deadline. Mr. Toledano's broker says that he sent a truck to the warehouse after getting an immediate export form approved by Customs, but that form is dated February 25, and was approved by Customs on February 28, several days after the deadline for removing the goods from the United States. EG&G's employees say that they had no contact with Mr. Toledano's broker until after the expiration of the February 21 deadline. We do not know what documentation Mr. Toledano's broker provided to Customs, so we cannot determine whether that documentation was sufficient to satisfy Customs's requirements for obtaining goods that were destined for export. Even if the documentation was sufficient, however, it appears that Mr. Toledano's broker presented it to EG&G after the February 21 deadline. Mr. Toledano's broker did not attempt to remove the goods from EG&G's warehouse before February 21, which means that EG&G could not have interfered with the broker's efforts to remove the goods by that deadline. Mr. Toledano's breach is not excused, therefore, by any actions of EG&G.

¹ In his notice of appeal, Mr. Toledano also said that he purchased two lots of goods at the sale. Treasury's records show that the second lot (number 200) was purchased by someone else and Mr. Toledano never provided any documentation to show that he acquired any rights to those goods.

Mr. Toledano has not established that Treasury should refund his payment. As we explained in Shelomoh Sameyah v. Department of the Treasury, GSBCA 14733-TD, 99-1 BCA ¶ 30,266, forfeiture provisions such as the one contained in the Customs sale catalog are nearly always enforced when actual breach damages are either uncertain or difficult to measure. In rare and unusual cases, a party can establish that such a damages clause is unenforceable because at the time of contracting the parties did not intend for the clause to establish a fixed amount as compensation for a breach. Such an intent is found where the amount of compensation is extravagant or does not bear a reasonable relationship to the loss. Mr. Toledano has not alleged that actual breach damages were either certain or easy to measure, and there are no facts in our record to show that Customs knew what its damages would be if Mr. Toledano breached the contract. Mr. Toledano has not alleged that at the time of contracting he and Customs meant for the sale catalog clause to establish something other than a fixed amount as compensation for a breach. In addition, the amount retained by Customs bore a reasonable relationship to the loss caused by the breach, in that the Government's net revenue from a subsequent sale of the goods in lot number 210 was merely \$527.03. Only by keeping Mr. Toledano's payment of \$8250 can the Government receive anything close to market value for the goods. There is no basis upon which we can ignore the forfeiture provisions set out in the sale catalog and refund Mr. Toledano's payment.

Decision

The appeal is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

CATHERINE B. HYATT
Board Judge