

David Tunick, Inc. v. Kornfeld: Applying U.C.C. Section 2-716 and Uniqueness to a Section 2-508 Analysis

In *David Tunick, Inc. v. Kornfeld*,¹ the Southern District of New York decided whether a nonconforming tender of an art print may be cured by an offer of a substitute print from the same series of prints.² Mr. E. W. Kornfeld and Galerie Kornfeld und Cie ("Defendants") sold a Pablo Picasso print entitled *Le Minotaure* to plaintiff David Tunick, Inc. The print, in fact, bore a forged signature.³ Based on this knowledge, plaintiff demanded rescission of the sale and attempted to return the print to defendants.⁴ Although defendants offered a replacement print, also allegedly signed by Picasso, plaintiff refused to accept it. Consequently, plaintiff filed suit alleging breach of warranties, fraud, reckless misrepresentation, breach of duty of honesty and fair dealing, and breach of fiduciary duty.⁵ Defendants denied the allegations, contending that the signature was genuine, and filed counterclaims alleging breach of contract, unjust enrichment, and fraud.⁶ Defendants sought summary judgment on each of plaintiff's five claims for relief and on defendants' first counterclaim alleging breach of contract.⁷ The district court denied defendants' motion for summary judgment on plaintiff's breach of warranty claim.⁸ The court held that section 2-508 of the Uniform Commercial Code ("U.C.C."), as enacted in New York,⁹ did not provide defendants with a defense to plaintiff's breach of warranty claim

1. 838 F. Supp. 848 (S.D.N.Y. 1993).

2. *Id.* at 851.

3. The defendants represented to the plaintiff that the print was signed by Picasso. *Id.* at 849.

4. *Id.* at 850.

5. *Id.*

6. The defendants filed the counterclaims against plaintiff, David Tunick, Inc., and counterclaim defendant, David Tunick, who are collectively known as "plaintiff." *Id.* at 849.

7. *Id.* This Note concentrates on the plaintiff's first claim of alleged breach of warranties.

8. *Id.* at 850.

9. U.C.C. § 2-508 (1978 version). Because New York has maintained the same language as the original Uniform Commercial Code, this Note will refer to the U.C.C.

because of the unique quality of such prints.¹⁰ The court supported this holding with section 2-716's remedy of specific performance and its own history of finding that prints are unique goods.¹¹

Under section 2-508, a seller is under a duty to deliver goods that conform precisely to a sales contract, and a buyer has the right to reject or revoke acceptance of goods that do not conform to the contract.¹² However, rejection by a buyer does not automatically terminate a contract. Under certain circumstances, the seller may still effect a cure by delivering conforming goods in place of the nonconforming goods, thus precluding unfair rejection and cancellation by the buyer.¹³ Pursuant to section 2-508, a seller may still effect a cure by replacing the original goods with a substitute within the original contract period or within a reasonable time after the expiration of such period.¹⁴ The fact that the seller has expressly warranted that the buyer would be satisfied with the goods does not bar the seller from correcting a nonconforming tender in accordance with section 2-508.¹⁵ The qualifying seller is protected if he had "reasonable grounds to believe" that the original tender would be acceptable. Comment 2 to section 2-508 specifies that "such reasonable grounds can lie in prior course of dealing, course of performance, or usage of trade as well as particular circumstances surrounding the making of the contract."¹⁶ Section 2-508 creates the cure opportunity for the qualifying seller to make a tender or delivery that is "conforming." "Goods and any part of a performance are 'conforming' to a contract under Article 2 'when they are in accordance with the obliga-

10. 838 F. Supp. at 852. The district court also held that in lieu of the breach of warranties claim the plaintiff submitted sufficient evidence to place the authenticity of the Picasso signature in dispute. *Id.* at 850.

11. *Id.* at 852.

12. A purchaser who in good faith revokes his acceptance of goods has the same rights and duties with regard to the goods involved as if he rejected them. *See* U.C.C. § 2-608(3).

13. *See* U.C.C. §§ 2-508 and 2-719.

14. Section 2-508 provides that:

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

15. RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE § 2-508:3 (3rd ed. 1983).

16. U.C.C. § 2-508, Comment 2.

tions under the contract."¹⁷ "To constitute an adequate cure, therefore, the seller's cure tender must be a perfect tender in all aspects of the contract specifications If the attempted cure falls short of this standard, the buyer is entitled to reject the substituted goods or their tender as nonconforming."¹⁸ Whether there has been a conforming delivery is a question of fact to be determined within the framework of the circumstances of each particular case.¹⁹ Indeed, since a cure is not sufficient unless it places the parties in the same position they would have been in had the goods been conforming, a seller of a "unique" good may not qualify under section 2-508. Arguably, if a good is intrinsically unique, there is never a fungible or perfect substitute.²⁰ Section 2-716 addresses a buyer's equitable right to specific performance in such situations.²¹ The equitable relief of specific performance would not be granted if the legal remedy of damages was adequate to protect the injured party.²² "A critical factor in determining whether damages are an adequate remedy is whether money can buy a substitute for the promised performance. If a substitution can be readily obtained, the damages remedy is ordinarily regarded as adequate."²³ In some situations, however, no substitute is available. Indeed, section 2-716(1) provides a buyer the right to specific performance when the goods are unique or other proper circumstances are shown. Traditionally, "unique" items were restricted to land, heirlooms and objects of art.²⁴ However, with the enactment of section 2-716, the U.C.C. sought "a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale."²⁵

17. William H. Lawrence, *Cure Under Article 2 of the Uniform Commercial Code: Practices and Prescriptions*, 21 U.C.C.L.J. 138, 167 (1988) (quoting U.C.C. § 2-106(2)).

18. *Id.*

19. *Anderson, supra* note 15, at § 2-508:11.

20. 838 F. Supp. at 851-52.

21. U.C.C. § 2-716(1) provides that "[s]pecific performance may be decreed where the goods are unique or in other proper circumstances."

22. E. ALLAN FARNSWORTH, *CONTRACTS* § 12.6, at 826 (1982).

23. *Id.* at 828.

24. See Harold Greenberg, *Specific Performance Under Section 2-716 of the Uniform Commercial Code*, 17 NEW ENG. L. REV. 321, 323 (1982).

25. U.C.C. § 2-716, Comment 1. In accordance with this more liberal approach, the drafters of the U.C.C. included in the comments a new concept of "uniqueness" and specific performance. Specific performance would not be limited to goods already specified or ascertained at the time of contracting, but could extend to "[o]utput and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases." U.C.C. § 2-716, Comment 2.

In its denial of defendants' motion for summary judgment on plaintiff's breach of warranty claim, the district court explicitly rejected defendants' defense to plaintiff's contention that defendants breached their express warranties.²⁶ Defendants argued that even if they breached the express warranty that the signature was genuine, plaintiff's refusal to accept a replacement print allegedly signed by Picasso defeated plaintiff's ability to recover for breach of warranty.²⁷ When a buyer refuses to allow a qualifying seller to exercise his rights to make a curative tender under section 2-508, the buyer cannot then sue the seller for breach of warranty.²⁸ Indeed, defendants believed that their offer to replace the print with another print of *Le Minotaure* met the standards of section 2-508, and thus, plaintiff could not have properly rejected the substitute and looked to alternative remedies.²⁹ The court agreed, however, with plaintiff's contention that section 2-508 did not apply to art prints. The district court considered whether prints were substitutable for one another.³⁰ The court found that "two prints, by the same artist and from the same plates, [were] not interchangeable."³¹ In essence, the court concluded that because prints are intrinsically unique in quality and condition, they cannot be sufficiently replaced according to the agreement between the buyer and seller. Using authority from the art world, the court determined that two prints from a series produced by an artist possess distinctive qualities that may impact their aesthetic and economic value.³² For example, there may be a fall off in quality from the first to last print from a plate;³³ the price of a print may be inflated by some quality not shared by other prints in the same series;³⁴ or coloration and contrast may vary among prints in a series.³⁵ Furthermore, the court cited authority for the proposition that because of the fragility of prints, their value diminishes by the manner in which they are treated over time.³⁶ The *Le Minotaure*

26. The express warranties are "(a) that the [signature on the Print was] authentic and (b) that the [Print] had been signed in 1942 and had gone directly from Picasso to a private collector whose widow consigned it to Defendants for sale at the auction." 838 F. Supp. at 850.

27. *Id.*

28. *Anderson, supra* note 15, at § 2-508:10.

29. 838 F. Supp. at 850.

30. *Id.* at 851.

31. *Id.*

32. *Id.*

33. *Id.* (citing LEE ROSENBAUM, *THE COMPLETE GUIDE TO COLLECTING ART* 134 (1982)).

34. *Id.* (citing GUY R. WILLIAMS, *COLLECTING PICTURES* 86 (1968)).

35. *Id.*

36. *Id.* (citing CHRISTIE'S GUIDE TO COLLECTING 110-11 (Robert Cumming ed., Prentice-Hall 1984)).

romachie print and its substitute were in fact more than forty years old and had each been under the ownership of at least two other persons. Bearing this in mind, the court conceded that the conditions of the nonconforming and substituted prints impacted their value and distinguished one from the other.³⁷ The court also looked to the reasons why a particular print is chosen over another: each print is uniquely beautiful, interesting, or well-suited to a collection.³⁸ Thus, each print is inherently different. Although plaintiff was not seeking specific performance, the court included in its analysis section 2-716's definition and accompanying comment on "uniqueness." Applying section 2-716 and its historical reference to works of art as unique goods eligible for specific performance, the court further concluded that each specific print of a series is inherently unique and unsubstitutable.³⁹ The court found that because analogous cases grant the remedy of specific performance, the trend in courts is to find that prints constitute unique goods.⁴⁰

At issue before the district court was whether a nonconforming tender of an art print may be sufficiently cured under section 2-508 by an offer of a different but similar work.⁴¹ The court's holding is novel because it cross-references sections 2-508 and 2-716, two sections that are seemingly unrelated. *Kornfeld* is not a specific performance case, yet the court applies section 2-716(1) and its accompanying comments to the facts at hand. The court then finds that prints, as unique goods, are inherently different, not interchangeable, and unsubstitutable goods.⁴² However, the issue of whether a print of limited edition would meet the "uniqueness" test of section 2-716 should not have been the sole basis for the court's finding. Rather, the court should have factored into its finding the reasonable expectations of the buyer and seller in the art arena. Section 2-508 and accompanying comment 2 sufficiently direct the court to fairly determine the expectations upon the purchase and sale of fine art. "Section 2-508 seeks to avoid injustice to the seller by reason of a surprise rejection by the buyer."⁴³ In addition, "the seller is charged with commercial knowledge of any factor in a particular sales situation which require him to comply strictly with his obligation under

37. *Id.* at 852.

38. *Id.*

39. *Id.*

40. *Id.* Court refers to *Chabert v. Robert & Co.*, 76 N.Y.S.2d 400, 402 (1st Dep't 1948), which discusses specific performance in the context of photographic prints.

41. 838 F. Supp. at 851.

42. *Id.* at 851-52.

43. U.C.C. § 2-508, Comment 2.

the contract"⁴⁴ Although the comment to section 2-508 gives examples of such exchanges,⁴⁵ section 2-508 is not limited to these situations. Rather, the language of the U.C.C. can appropriately be applied to the particular commercial transaction of art buying. The court's determination that art property is unique is correct because "[t]he property involved is often singular and irreplaceable."⁴⁶ Yet, the court failed to broaden its focus and consider the various factors that exist in the art world that make each purchase different: the value of artwork often escalates according to the artist's reputation at the time of the sale; the art world traditionally practices casual commercial practices; art is often purchased on impulse by uninformed buyers; and widespread abuse exists in the sale of multiples of prints and sculptures without furnishing the buyer with adequate information as to their nature or uniqueness.⁴⁷ Thus, whereas the art buyer should observe the same precautions ordinarily used by the prudent buyer in other commercial transactions of like value,⁴⁸ the seller should remain aware of the particular circumstances and expectations surrounding the sale of its art at that time. Narrowly focusing on "uniqueness" as the determinative factor for barring a seller's right to cure ultimately ignores situations involving unique goods and curable nonconformities. For example, if a wholesale buyer purchases uniquely cut diamonds that will be resold to retailers, and the seller offers to exchange a flawed diamond for another similar cut that the seller can prove could be resold for even more than the original, this is a curable nonconformity. It would be unjust for a court to dismiss the cure solely on the basis of the "uniqueness" of diamonds. Rather, the court should also consider the reasonable expectations of the wholesale buyer and the seller. In doing so, the court is fairly ascertaining the issue within the scope of section 2-508, without having to impliedly apply section 2-716 and specific performance. Indeed, in order to determine whether the *Kornfeld* court justly dismissed defendants' motion for summary judgment on plaintiff's breach of warranty claim, one must not only consider the uniqueness of art prints but the reasonable expectations of the art seller (the

44. *Id.*

45. The examples supplied in comment 2 of section 2-508 include strict conformity of documents in an overseas shipment, sale of precision parts, and chemicals for use in manufacture.

46. RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTIST*, at 49 (1989).

47. *Id.*

48. *Id.*

defendants) and the collector (the plaintiff) arising out of their transaction.

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