

# Contracts--Statute of Frauds--Defense Held Not Available Where Goods Were Specially Manufactured for Seller by Third Party (E. G. Young Lumber Co. v. New York Bondstone Corp., 179 N.Y.S.2d 45 (App. T. 2d Dep't 1958))

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in the field of electronic eavesdropping legislation.<sup>37</sup> The advances in modern electronic instruments make the federal position difficult to understand. Since the results accomplished are the same,<sup>38</sup> the distinction between wiretapping and eavesdropping would appear to have become academic. This is illustrated by a comparison of the principal case with *United States v. Hill*.<sup>39</sup> In the latter, there was dicta to the effect that holding a microphone close to a telephone receiver without physically touching it would be a violation of section 605. In the principal case the fact that no telephone communication was involved removed it from the purview of the wiretap statute. Hence, it seems that whether the methods employed are legal or illegal turns on a mere technicality. Such a situation makes it imperative that Congress enact legislation which will govern the area of electronic eavesdropping and thus serve to complement section 605. Such legislation should specifically permit wiretapping by federal officers under court order.<sup>40</sup> A similar provision should be added to section 605.

An improvement can be made in New York legislation by excluding illegally obtained eavesdropping and wiretapping evidence in criminal as well as in civil trials. Such an amendment will not hinder lawful eavesdropping but will act as a positive deterrent against police officers illegally eavesdropping to obtain information which they know will be admitted in criminal trials. It scarcely needs to be said that police officers should not be permitted to violate the very laws they are sworn to uphold.<sup>41</sup>



CONTRACTS—STATUTE OF FRAUDS—DEFENSE HELD NOT AVAILABLE WHERE GOODS WERE SPECIALLY MANUFACTURED FOR SELLER BY THIRD PARTY.—Plaintiff-seller ordered special window frames to be manufactured by a third party in order to fill plaintiff's oral con-

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*Nardone v. United States*, 308 U.S. 338 (1939); *Nardone v. United States*, 302 U.S. 379 (1937).

<sup>37</sup> See text accompanying notes 11 and 12 *supra*.

<sup>38</sup> The report states: "In purpose and result, of course, the . . . act here involved [electronic eavesdropping] is exactly the same as the recognized felony of wiretapping." 1957 LEG. DOC. NO. 29, REPORT, N.Y. STATE JOINT LEGISLATIVE COMM. TO STUDY ILLEGAL INTERCEPTION OF COMMUNICATIONS 15 (1957).

<sup>39</sup> 149 F. Supp. 83 (S.D.N.Y. 1957).

<sup>40</sup> See Senator Keating's proposed legislation on this point. 105 CONG. REC. 2943 (daily ed. March 5, 1959).

<sup>41</sup> Gerhart, *Let's Take the Hypocrisy Out of Wiretapping*, 30 N.Y.S. BAR BULL. 268, 274 (1958).

tract with defendant-buyer. Defendant refused to accept the goods, pleading as a defense the statute of frauds. Section 85(2) of the New York Personal Property Law provides that a contract of sale need not be in writing where "the goods are manufactured by the seller especially for the buyer. . . ." Construing section 85(2), the Court *held* that even though the goods were not manufactured by the seller, the defense of the statute of frauds was not available to the defendant since the goods were specially made for the buyer. *E. G. Young Lumber Co. v. New York Bondstone Corp.*, 179 N.Y.S.2d 45 (App. T. 2d Dep't 1958).

Prior to the enactment in most states of section 4(2) of the Uniform Sales Act, there were three rules in common usage governing the interposition of the statute of frauds as a defense to an action on an oral contract.<sup>1</sup> The English rule was based on the Act for the Prevention of Frauds and Perjuries,<sup>2</sup> adopted in England in 1676. The application of this statute, requiring that contracts for the sale of goods exceeding ten pounds in value be in writing, involved the difficulty of determining whether the buyer had bargained for the product itself or for the work and labor to be performed by the seller.<sup>3</sup> Where the primary object of the contract was the product to be sold, the statute required that the contract be in writing.<sup>4</sup> However, where the essence of the contract called for the seller's services, the statute was not applicable.<sup>5</sup> The difficulty of making this distinction continued to be a problem<sup>6</sup> until the repeal of this section of the statute of frauds in 1954.<sup>7</sup> Where goods are manufactured by a third party, the contract is for the sale of goods.<sup>8</sup> Since the work and labor by the third party was performed for the seller's benefit, not for the buyer's, it would seem he executed a sale of goods within the meaning of the statute.<sup>9</sup>

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<sup>1</sup> See 2 WILLISTON, CONTRACTS §§ 508-09 (rev. ed. 1936).

<sup>2</sup> 29 Car. 2, c. 3, § 17. This section provides: ". . . no contract for the sale of any goods, wares and merchandises, for the price of ten pounds Sterling or upwards, shall be allowed to be good, except . . . that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged. . . ."

<sup>3</sup> See 2 WILLISTON, *op. cit. supra* note 1, § 508.

<sup>4</sup> *Lee v. Griffin*, 1 B. & S. 272, 121 Eng. Rep. 716 (Q.B. 1861); *Watts v. Friend*, 10 B. & C. 446, 109 Eng. Rep. 516 (K.B. 1830).

<sup>5</sup> *Clay v. Yates*, 1 H. & N. 73, 156 Eng. Rep. 1123 (Ex. 1856). For a discussion of the distinction between contracts of sale and contracts for work and labor, see *Grafton v. Armitage*, 2 C.B. 336, 135 Eng. Rep. 975 (C.P. 1845); *Clark v. Mumford*, 3 Camp. 37, 170 Eng. Rep. 1298 (K.B. 1811).

<sup>6</sup> See *Marcel v. Tapper*, [1953] 1 Weekly L.R. 49 (Q.B.).

<sup>7</sup> The Act for the Prevention of Frauds and Perjuries of 1676 was recodified and became the Sales of Goods Act, 1893, 56 & 57 Vict., c. 71, § 4, repealed by the Law Reform Act, 1954, 2 & 3 Eliz. 2, c. 34, § 2.

<sup>8</sup> *Atkinson v. Bell*, 8 B. & C. 277, 108 Eng. Rep. 1046 (K.B. 1828).

<sup>9</sup> See 2 CORBIN, CONTRACTS § 476, at 624 (1950); 2 WILLISTON, CONTRACTS § 509 (rev. ed. 1936).

The Massachusetts common-law rule differed from the English rule in its method of distinguishing between contracts of sale and contracts for work and labor.<sup>10</sup> In Massachusetts the distinction was based on whether the goods to be manufactured were suitable for sale to the general public.<sup>11</sup> Where the contract was for goods resalable in the ordinary course of the seller's business, the statute was a good defense.<sup>12</sup> If the goods were to be made according to the buyer's special order and were not readily resalable, the contract was viewed as one involving services and the statute of frauds was not applicable.<sup>13</sup> However, where the goods were manufactured by a third party to the buyer's special order, the statute was available as a defense.<sup>14</sup> The adoption of the Uniform Sales Act by Massachusetts did not change the common-law rule.<sup>15</sup> The applicability of the statute of frauds was still dependent on whether the contract called for the manufacture by the seller of goods not suitable for sale to others in the ordinary course of the seller's business.<sup>16</sup>

In 1958 the common-law rule in Massachusetts as set forth in its adoption of the Uniform Sales Act was superseded by the adoption of the Uniform Commercial Code.<sup>17</sup> Today,

. . . if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement . . .

the contract does not fall within the statute of frauds.<sup>18</sup>

<sup>10</sup> See 2 CORBIN, *op. cit. supra* note 9, § 477, at 625. See also 2 WILLISTON, *op. cit. supra* note 9.

<sup>11</sup> Clark v. Nichols, 107 Mass. 547 (1871); Waterman v. Meigs, 58 Mass. (4 Cush.) 497 (1849); Lamb v. Crafts, 53 Mass. (12 Met.) 353 (1847).

<sup>12</sup> Goddard v. Binney, 115 Mass. 450, 454-55 (1874); Spenser v. Cone, 42 Mass. (1 Met.) 283 (1840); Mixer v. Howarth, 38 Mass. (21 Pick.) 205 (1838).

<sup>13</sup> Smalley v. Hamblin, 170 Mass. 380, 49 N.E. 626 (1898).

<sup>14</sup> Rosen v. Garston, 319 Mass. 390, 66 N.E.2d 29 (1946); Adams v. Cohen, 242 Mass. 17, 136 N.E. 183 (1922). The statute of frauds provision of the Uniform Sales Act was adopted in Massachusetts by MASS. ANN. LAWS ch. 106, § 6 (1909).

<sup>15</sup> M. K. Smith Corp. v. Ellis, 257 Mass. 269, 153 N.E. 548 (1926) (contract to manufacture special storage tank is a contract for work and labor); Brooks v. Stone, 256 Mass. 167, 152 N.E. 59 (1926) (contract for the manufacture of specially sized and shaped carpets not suitable for resale is a contract for work and labor); Pope v. Brooks, 249 Mass. 381, 144 N.E. 214 (1924) (contract to furnish special rugs imported from China where they were manufactured by a third party is a contract of sale); Atlas Shoe Co. v. Rosenthal, 242 Mass. 15, 136 N.E. 107 (1922) (contract for special shoes manufactured by a third party is a contract of sale).

<sup>16</sup> Rosen v. Garston, *supra* note 14.

<sup>17</sup> MASS. ANN. LAWS ch. 106, § 2-201 (1958).

<sup>18</sup> *Ibid.*

The New York common-law rule presented a third method of determining whether a contract was for the sale of goods or for the performance of work and labor.<sup>19</sup> The distinction<sup>20</sup> was drawn between a contract for goods to be manufactured, which was considered to be for services and so not within the statute of frauds, and a contract for goods in existence at the time of the contract.<sup>21</sup> Where the article contracted for was in existence, the contract was for the sale of goods even though the seller was required to perform some additional act to adapt it to the purchaser's use.<sup>22</sup> A contract for goods to be manufactured for the seller by a third party and not resalable in the regular course of the seller's business was treated as one for the performance of work and labor, and so not subject to the statute of frauds.<sup>23</sup>

The adoption of the Uniform Sales Act<sup>24</sup> revised the common-law rule in New York by requiring that, in order to avoid the applicability of the statute, the goods must be manufactured especially to the buyer's order and be not resalable in the regular course of the seller's business.<sup>25</sup> There is a diversity of opinion in New York as to whether the Uniform Sales Act has changed the common-law rule where a third party manufactures the goods for the seller.<sup>26</sup> The Appellate Division, First Department, literally construing the provision that ". . . if the goods are to be manufactured by the seller

<sup>19</sup> 2 WILLISTON, CONTRACTS § 509 (rev. ed. 1936). See 2 CORBIN, CONTRACTS § 477 (1950).

<sup>20</sup> *Parsons v. Loucks*, 48 N.Y. 17 (1871). This court held that "the distinction is between the sale of goods in existence, at the time of making the contract, and an agreement to manufacture goods." *Id.* at 19.

<sup>21</sup> *Millar v. Fitzgibbons*, 9 Daly 505 (N.Y.C.P. 1881); *Ferren v. O'Hara*, 62 Barb. 517 (N.Y. Sup. Ct. 1862); *Parker v. Schenck & Rutherford*, 28 Barb. 38 (N.Y. Sup. Ct. 1858); *Donovan v. Willson*, 26 Barb. 138 (N.Y. Sup. Ct. 1857).

<sup>22</sup> *Flint v. Corbitt*, 6 Daly 429 (N.Y.C.P. 1876) (covering already-made furniture to suit customer's taste is not the performance of work and labor); *Cooke v. Millard*, 65 N.Y. 352 (1875) (cutting lumber to specified sizes is not the performance of work and labor).

<sup>23</sup> *Morse v. Canasawacta Knitting Co.*, 154 App. Div. 351, 139 N.Y. Supp. 634 (3d Dep't 1912), *aff'd mem.*, 214 N.Y. 695, 108 N.E. 1101 (1915). This was an attempt to avoid imposing hardship on a seller who would be liable to a manufacturer for goods which would be useless to him. *But see Juilliard v. Trokie*, 139 App. Div. 530, 124 N.Y. Supp. 121 (1910), *aff'd mem.*, 203 N.Y. 604, 96 N.E. 1117 (1911).

<sup>24</sup> N.Y. PERS. PROP. LAW § 85(2). "[I]f the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply." *Ibid.*

<sup>25</sup> See *Berman Stores Co. v. Hirsh*, 240 N.Y. 209, 213, 148 N.E. 212-13 (1925). Compare *Parsons v. Loucks*, 48 N.Y. 17 (1871), with *Pearlberg v. Levisohn*, 112 Misc. 95, 182 N.Y. Supp. 615 (Sup. Ct. 1920).

<sup>26</sup> Compare *Eagle Paper Box Co. v. Gatti-M'Quade Co.*, 99 Misc. 508, 164 N.Y. Supp. 201 (Sup. Ct.), *aff'd without opinion*, 181 App. Div. 924, 167 N.Y. Supp. 1097 (1st Dep't 1917), with *E. G. Young Lumber Co. v. New York Bondstone Corp.*, 179 N.Y.S.2d 45 (App. T. 2d Dep't 1958).

especially for the buyer . . . this section shall not apply,"<sup>27</sup> held that where the seller did not himself perform the work and labor the statute will deny recovery unless the contract is in writing.<sup>28</sup> However, in the instant case, the Appellate Term, Second Department, maintained that whether the seller or a third party did the manufacturing is irrelevant so long as the article was made especially for the buyer.<sup>29</sup> The Court held that the words "by the seller" should not be given undue significance and that the words "especially for the buyer" establish the correct test to determine the applicability of the statute of frauds.<sup>30</sup>

A literal construction of the Uniform Sales Act necessitates that the exemption to the statute of frauds depend on two conditions—first, that the goods are manufactured by the seller; second, that they are manufactured especially for the buyer. This literal construction is in accord with Professor Williston's express intent, as draftsman of the act, to adopt the Massachusetts rule denying recovery in the case of a third-party manufacturer.<sup>31</sup>

The New York Court of Appeals has never expressed an opinion on this issue.<sup>32</sup> It is reasonable to suppose that the court will interpret section 85(2) of the Personal Property Law, as did the Court in the principal case, in light of the New York common-law rule allowing recovery to a seller where a third party manufactured the goods. The Uniform Commercial Code, which is of more recent origin, has expressly adopted this view.<sup>33</sup>

The decision in the principal case seems to give a result more suitable to commercial transactions than does the literal construction given the Uniform Sales Act by the First Department. The inequitable burden upon a seller "stuck" with specially-made, unsalable goods, and the growing tendency for a vendor to have the goods he sells manufactured by a third party, requires that the statute be re-evaluated and applied in keeping with modern business methods and practices.

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<sup>27</sup> N.Y. PERS. PROP. LAW § 85(2).

<sup>28</sup> *Eagle Paper Box Co. v. Gatti-M'Quade Co.*, *supra* note 26.

<sup>29</sup> *E. G. Young Lumber Co. v. New York Bondstone Corp.*, *supra* note 26.

<sup>30</sup> *Id.* at 49.

<sup>31</sup> 2 WILLISTON, CONTRACTS § 509A (rev. ed. 1936).

<sup>32</sup> See *E. G. Young Lumber Co. v. New York Bondstone Corp.*, 179 N.Y.S.2d 45, 49 (App. T. 2d Dep't 1958).

<sup>33</sup> UNIFORM COMMERCIAL CODE § 2-201 provides that a contract is enforceable without a writing "if the goods are to be especially manufactured for the buyer . . . and the seller . . . has made either a substantial beginning of their manufacture or commitments for their procurement . . ." (Emphasis added.)