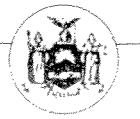
STATE OF NEW YORK DEPARTMENT OF LAW



OFFICE OF ATTORNEY GENERAL ROBERT ABRAMS

MEMORANDUM

TO: REF ATTORNEYS, PARALEGALS and LAW STUDENTS

DATE: 10/25/89

FROM: Mary Sabatini DiStephan MSD

RE: Auctions

As we discussed at last week's meeting, many sponsors are considering auctioning condo or coop units probably because the market is presently so poor. They are questioning what if anything must be done in order to satisfy Martin Act requirements.

The following disclosures should be required to be made in a duly filed amendment to the plan in order to satisfy disclosure mandates of the statute:

(1) All prospective bidders will have at least three business days to review the plan before taking part in the auction. In the alternative, they will have seven days to rescind after a successful bid (an option I doubt many sponsors will choose).

(2) The procedure for obtaining an offering plan and to register to take part in the auction must be fully described.

(3) The date, time and place for the auction must be stated.

(4) The auction procedure must be fully disclosed, i.e., whether there are minimum bids; which units are being auctioned; whether the highest bid must be accepted; whether the auction is "with reserve" (auctioneer may withdraw the "goods" at any time until he announces completion of the sale) or "without reserve" (after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time).

(5) The plan must reflect the highest price for the units to be auctioned, so that proper fees will be collected.

I am attaching relevant statutes* dealing with auctions and prizes generally. You can refer attorneys to these statutes for their information although they are not directly relevant to our disclosure requirements. The Consumer Frauds Bureau handles auction complaints.

* Statutes attached are:

G.B.L. Article 3 - Auctions and Auctioneers
U.C.C. § 2-328 - Sale by Auction
G.B.L. § 369-ee - Prize award schemes

MSD:kd
Attachment

ARTICLE 3—AUCTIONS AND AUCTIONEERS

Section

[20. Repealed.]
21. Commissions; penalty.
22. Power of common council of cities.
23. Automobile auctioneer.
24. Mock auction.
25. Records to be kept by auctioneers.
26. Record open to inspection.
27. Penalties.
28. Limitation.

Cross References

Licensed auctioneer selling at auction excepted from provisions regarding going out of business sales, see section 584.

Sale by auction, see Uniform Commercial Code § 2-328.

WESTLAW Electronic Research

WESTLAW supplements McKinney's Consolidated Laws of New York and is useful for additional research. Enter a citation in Insta-Cite for display of any parallel citations and case history. Enter a statute citation in a case law database for cases of interest.

Example query for Insta-Cite: IC 403 N.Y.S.2d 123

Example query for New York Constitution: N.Y.Const. Const. Constitution /s 6 VI +3 3

Example queries for statute: G.B.L. "General Business" Gen.Bus! /5 340

Also, see the WESTLAW Electronic Research Guide following the Explanation.

[§ 20. Repealed. L.1911, c. 571, § 2, eff. Sept. 1, 1911]

Historical Note

Section, L.1909, c. 25, related to conduct of auction sales.

§ 21. Commissions; penalty

An auctioneer in any county, other than New York or Kings, shall not, without a previous agreement in writing, with the owner or consignee of the goods sold, demand or receive a greater compensation for his services than a commission of two and one-half per centum on the amount of any sale, public or private, made by him.

For a violation of this section he shall refund the moneys illegally received and forfeit two hundred and fifty dollars to each person from whom he demands or receives an unlawful compensation or commission.

(L.1909, c. 25.)

Historical Note

Derivation. L.1896, c. 376, § 51; originally revised from R.S., pt. 1, c. 17, tit. 1, §§ 23, 24.

Cross References

Contract to pay compensation of auctioneer exempt from statute of frauds, see General Obligations law § 5-701.

Library References

American Digest System

Compensation of auctioneer, see Auctions and Auctioneers ⟹10.

Offenses by auctioneers, see Auctions and Auctioneers ⟹13.

Encyclopedia

Compensation of auctioneer, see C.J.S. Auctions and Auctioneers § 22.

Offenses by auctioneers, see C.J.S. Auctions and Auctioneers § 27.

Notes of Decisions

Additional compensation 2
Construction with other laws 1
Expenses 3
Quantum meruit 4

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1. Construction with other laws

The provision of New York City Administrative Code that auctioneers in sales on behalf of sheriff of such city shall be entitled to commissions not exceeding customary market rate of auctioneers' fees for similar services limits fee of such auctioneer in Bronx county to 2½ percent of sale price under this section, in absence of written agreement between parties for payment of larger commission. Di Palma v. Carraro, 1943, 180 Misc. 998, 45 N.Y.S.2d 206.

2. Additional compensation

Where defendant, an auctioneer, advanced to plaintiff $5,000 on certain stock and fixtures, and agreed to sell them at auction, guaranteeing them to bring at least $6,000, the proceeds over the sum of $5,500 to be divided between them equally, and the goods were sold for $6,201, whereupon defendant tendered plaintiff one-half of the proceeds over $5,500, the contract was not a sale of the goods to defendant, but an agreement by him to sell the goods for plaintiff on commission, and plaintiff was entitled to the $5,500 absolutely, and in addition thereto one-half of the proceeds over that sum. Caesar Misch Incorporation v. Mosheim, 1908, 123 App.Div. 322, 107 N.Y.S. 1092.

For services not within the scope of his employment as an auctioneer, he may be entitled to receive additional compensation. Russell v. Miner, 1872, 61 Barb. 534.

3. Expenses

The Revised Statutes did not prohibit an allowance to an auctioneer of actual expenses in addition to the statutory commission. Russell v. Miner, 1881, 25 Hun 114.

4. Quantum meruit

If the sale was stopped by the owner, the auctioneer could recover the reasonable value of his services, not to exceed,

however, the statutory allowance when there was no written contract. Donald v. Lawson, 1904, 87 N.Y.S. 485. See, also, Leeds v. Bowen, 1863, 2 Abb. Prac.,N.S., 43, 1 Robt. 10.

§ 22. Power of common council of cities

Except as otherwise provided in the charter of the city, the common council of a city may designate such place within such city for the sale by auction of horses, carriages and household furniture, as it deems expedient.

(L.1909, c. 25.)

Historical Note

Derivation. L.1896, c. 376, § 52; originally revised from R.S., pt. 1, c. 17, tit. 1, § 20.

Cross References

Auctions in public markets of cities, see Agriculture and Markets Law § 269.
Sale of disabled horse unlawful, see Agriculture and Markets Law § 358.

Library References

American Digest System
Power to regulate auctions, see Auctions and Auctioneers ⟹1.
Encyclopedia
Regulation of auctions in general, see C.J.S. Auctions and Auctioneers § 3.

§ 23. Automobile auctioneer

1. Definitions. The term "automobile auctioneer" as used in this section means any person, not claiming title in himself, who sells or offers for retail sale more than five motor vehicles, motorcycles or trailers in any calendar year, or who displays or permits the display of three or more motor vehicles, motorcycles or trailers for retail sale in any one calendar month upon premises owned or controlled by him.

2. Title. An automobile auctioneer shall not sell a motor vehicle unless he has in his possession the currently valid certificate of title to that motor vehicle, or, if a certificate of title is not required, then he shall have in his possession the appropriate proof of ownership for such motor vehicle. Title or proof of ownership shall be delivered to the purchaser immediately upon acceptance of tender of payment.

3. Disclosure. No motor vehicle shall be sold by an automobile auctioneer unless he has disclosed the identity of the individual who is actually transferring title or proof of ownership.

4. Warranties. a. Notwithstanding any provision of law to the contrary, in any contract of sale by an automobile auctioneer, there shall be a warranty that:

(1) the title or proof of ownership conveyed shall be good, and its transfer rightful; and

(2) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

b. Any waiver of the warranty provided for in paragraph a of this subdivision by a buyer shall be deemed contrary to public policy and shall be void and unenforceable. Any attempt by an automobile auctioneer to exclude or modify such warranties shall constitute a violation of this section.

5. Documentation of transactions. In addition to the records required to be kept by auctioneers pursuant to section twenty-five of this article, every sale by an automobile auctioneer shall be accompanied by an itemized receipt which shall contain the following information:

a. legal name, and trade name if different, of the automobile auctioneer;

b. address and telephone number of the automobile auctioneer;

c. name of the buyer;

d. make, year of manufacture, and identification number of said motor vehicle;

e. the amount of money paid; and

f. the date of delivery.

6. Certificate of prior use by automobile auctioneer. Upon the sale of any second-hand passenger motor vehicle, the automobile auctioneer shall execute and deliver to the buyer an instrument in writing which shall set forth the nature of the principal prior use of such vehicle when the automobile auctioneer knows or has reason to know that such use was as a taxicab, police vehicle, or driver education vehicle, or vehicle which has been repurchased pursuant to either section one hundred ninety-eight-a or one hundred ninety-eight-b of this chapter, a similar statute of another state, or an arbitration or alternative dispute procedure.

7. Fraudulent representation. No automobile auctioneer, sales person employed by such auctioneer, or agent or representative thereof selling or offering for sale any motor vehicle, motorcycle, or trailer shall make or use any untrue or misleading representations nor engage, directly or indirectly, in any act or practice or

course of business which operates or would operate as a fraud or deception upon any person.

8. Exceptions. The provisions of this section shall not apply to an auction or auctions at which only vehicles which are being sold pursuant to repossession, or foreclosure of a lien, or by or on behalf of an executor or administrator to settle an estate, or pursuant to a court order, or at an auction at which bids are accepted only from registered motor vehicle dealers, registered vehicle dismantlers or certified scrap processors. Vehicles sold at such an auction shall not be included in determining the number of vehicles sold at auction for the purpose of determining whether a person is an auctioneer.

9. Action by the attorney general. a. Upon any violation of this section, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of the violation. If it shall appear to the satisfaction of the court or justice that the defendant has violated this section, an injunction may be issued by the court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may make allowances to the attorney general as provided in paragraph six of subdivision (a) of section eighty-three hundred three of the civil practice law and rules, and direct restitution.

b. Whenever the court shall determine that a violation of this section has occurred, it may impose a civil penalty of not more than one thousand dollars for each violation. In connection with an application made under this subdivision, the attorney general is authorized to take proof and to make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

10. Additional remedies. In addition to the right of action granted to the attorney general pursuant to subdivision nine of this section, any buyer injured by a violation of this section may bring an action in his own name to enjoin such unlawful practice, an action to recover his actual damages or five hundred dollars, whichever is greater, or both such actions. The court in its discretion may increase the award of damages to an amount not to exceed three times the actual damages. The court may award costs and reasonable attorney's fees to a prevailing plaintiff.

11. Burden of proof. In any proceeding involving this section, the burden of proving an exception or inapplicability for the definition of automobile auctioneer is upon the person claiming it.

12. Severability clause. If any provision of this section or if any application thereof to any person or circumstance is held invalid, the remainder of the section and the application of the provision to other persons and circumstances shall not be affected thereby.

(Added L.1987, c. 170, § 1.)

Historical Note

Effective Date. Section effective Jan. 1, 1988, pursuant to L.1987, c. 170, § 2.

Former Section 23. Section, L.1909, c. 25; amended L.1927, c. 65, § 1, which related to bonds and appointment of auctioneers in cities, was repealed L.1947, c. 179, § 1.

Cross References

Action by attorney general, see Executive Law § 63.
Certificates by retail dealers on sales of second hand motor vehicles, see Vehicle and Traffic Law § 417.
Injunctions, see CPLR 6301 et seq.
Uniform vehicle certificate of title act, see Vehicle and Traffic Law § 2101 et seq.
Warranty of title and against infringement, see Uniform Commercial Code § 2-312.

Library References

American Digest System

Persons subject to regulations; public auctioneers, see Auctions and Auctioneers ⟹3.
Statutory and municipal regulation of auctions, see Auctions and Auctioneers ⟹2.

Encyclopedia

Agency of auctioneer; scope of authority, see C.J.S. Auctions and Auctioneers § 6.
Auctions, regulations in general, see C.J.S. Auctions and Auctioneers § 3.

§ 24. Mock auction

A person who buys or sells, or pretends to buy or sell, any goods, wares, or merchandise, or any species of property except ships, vessels, or real or leasehold estate, exposed for sale by auction, if an actual sale, purchase, and change of ownership therein does not thereupon take place, is guilty of a misdemeanor, punishable by imprisonment for thirty days, or by fine not exceeding one hundred dollars or both.

A person who obtains money or property from another, or obtains the signature of another to any writing, the false making of which would be forgery, by means of any false or fraudulent sale of

property or pretended property by auction, or by any of the practices known as mock auctions, is guilty of a misdemeanor; and in addition thereto he forfeits any license he may hold to act as an auctioneer, and is forever disqualified from receiving a license to act as an auctioneer in this state.

(Added L.1965, c. 1031, § 47.)

Historical Note

Effective Date. Section effective Sept. 1, 1967, pursuant to L.1965, c. 1031, § 195.

Derivation. Penal Law of 1909 § 943; repealed Penal Law of 1965 § 500.03.

Said section 943 was from Penal Code §§ 443, 574, L.1881, c. 676.

Former section 24. Section, L.1909, c. 25; amended L.1927, c. 65, § 1; and repealed by L.1947, c. 179, § 1, related to bonds and appointment of auctioneers in cities.

Library References

American Digest System

Offenses by auctioneers, see Auctions and Auctioneers ⟹13.

Penalties for violations of auction regulations, see Auctions and Auctioneers ⟹12.

Encyclopedia

Auctions, chilling the bid, see C.J.S. Auctions and Auctioneers § 14.

Auctions, puffing or by-bidding, see C.J.S. Auctions and Auctioneers § 15.

Offenses by auctioneers, see C.J.S. Auctions and Auctioneers § 27.

Purchase by auctioneer; irregular sales, see C.J.S. Auctions and Auctioneers § 17.

§ 25. Records to be kept by auctioneers

Every auctioneer or person engaged in the business of selling goods at auction, whether acting in his own behalf or as the officer, agent or representative of another, shall, upon the receipt or acceptance by him of any goods for the purpose of sale at auction, and before offering the same or any part thereof for sale at auction, write or cause to be written in a book to be kept by him for the purpose, the name and address of the person who employed him to sell such goods at auction, the name and address of the person for whose benefit, behalf or account such goods are to be sold at auction; the name and address of the person from whom such auctioneer received or accepted such goods; the name and address of the person who was the owner, the authorized agent of the owner or the consignor of such goods immediately prior to the receipt or acceptance for the purpose of sale at auction of the same by such auctioneer; the location, with street and number, if any, of such goods immediately prior to the receipt or acceptance of the same by such auctioneer for the purpose of sale at auction; the date of the receipt or acceptance by such auctioneer of such goods for the

purpose of sale at auction; the place, with street and number, if any, in which such goods are to be held, kept or stored until sold or offered for sale at auction; the place, with street and number, if any, in which such goods are to be sold or offered for sale at auction; a description of such goods, the quantity thereof and the distinctive marks thereon, if any; the terms and conditions upon which such auctioneer receives or accepts such goods for sale at auction. The expression "goods" as used in this section signifies any goods, wares, works of art, commodity, compound or thing, chattels, merchandise or personal property which may be lawfully kept or offered for sale, but shall not include goods damaged at sea or by fire and sold or to be sold for the benefit of the owners, insurers or for the account of whom it may concern or goods sold by virtue of judicial decree. The word "person" as used in this section includes a corporation, joint-stock association or copartnership. Nothing herein shall apply to the sale of real property at auction. The foregoing records shall be in addition to any other records required to be kept pursuant to section 6–108 of the uniform commercial code.

(Added L.1910, c. 640; amended L.1962, c. 552, § 17.)

Historical Note

Effective Date. Section effective Sept. 1, 1910, pursuant to L.1910, c. 640, § 2.

Cross References

Memorandum of sale by auctioneer, see General Obligations Law § 5–701.

Library References

American Digest System

Auctions, statutory and municipal regulations, see Auctions and Auctioneers ⟹2.

Encyclopedia

Auctions, regulations in general, see C.J.S. Auctions and Auctioneers § 2.

Notes of Decisions

1. False sales, failure to record

Alleged failure of auction house to record two false sales in its records as actual sales was insufficient, absent evidence of damages, to establish a cause of action under provision of the General Business Law setting forth the type of records required to be maintained by an auctioneer. Cristallina S.A. v. Christie, Manson & Woods Intern., Inc., 1986, 117 A.D.2d 284, 502 N.Y.S.2d 165.

§ 26. Record open to inspection

The said book and the entries therein, made as provided by the preceding section, shall, at all reasonable times, be open to the

inspection of the mayor and the head of the police department of the city in which the auctioneer conducts his business, the district attorney of any county in which said city is located or which is a part of such city, and any person who shall be duly authorized in writing for that purpose by any or either of them and who shall exhibit such written authorization to such auctioneer.

(Added L.1910, c. 640.)

Historical Note

Effective Date. Section effective Sept. 1, 1910, pursuant to L.1910, c. 640, § 2.

Library References

American Digest System

Auctions, statutory and municipal regulations, see Auctions and Auctioneers ⇐2.

Encyclopedia

Auctions, regulations in general, see C.J.S. Auctions and Auctioneers § 2.

§ 27. Penalties

Any person who violates or does not comply with the provisions of section twenty-five hereof, or any auctioneer or person engaged in the business of selling goods at auction who shall fail, neglect or refuse to permit or allow an inspection as required by section twenty-six hereof of the book, which he is required to keep according to the provisions of section twenty-five hereof, shall be guilty of a misdemeanor.

(Added L.1910, c. 640.)

Historical Note

Effective Date. Section effective Sept. 1, 1910, pursuant to L.1910, c. 640, § 2.

Library References

American Digest System

Auctions, penalties for violations of regulations, see Auctions and Auctioneers ⇐12.

Offenses by auctioneers, see Auctions and Auctioneers ⇐13.

Encyclopedia

Offenses by auctioneers, see C.J.S. Auctions and Auctioneers § 27.

§ 28. Limitation

Sections twenty-five, twenty-six and twenty-seven hereof shall apply only to cities of the first class and do not repeal or supersede

the provisions of chapter thirty-two, title B, article twenty-one of the administrative code of the city of New York.

(Added L.1910, c. 640; amended L.1941, c. 39, § 1.)

Historical Note

Effective Date. Section effective Sept. 1, 1910, pursuant to L.1910, c. 640, § 2.

Library References

American Digest System

Auctions, statutory and municipal regulations, see Auctions and Auctioneers ⇐2.

Encyclopedia

Auctions, regulations in general, see C.J.S. Auctions and Auctioneers § 2.

ARTICLE 3-A—PRIVATE BANKING [REPEALED]

[§§ 25 to 29-g. Repealed. L.1914, c. 369, § 500, eff. Nov. 1, 1914]

Historical Note

Sections 25 to 29-g, added L.1910, c. 348; sections 25, 27, 28, 29-a, 29-d and 29-e amended L.1911, c. 393, related to private banking, and are now covered by Banking Law § 160 et seq.

without buyers notifying seller of disapproval, there was "failure seasonably to notify the seller of election to return the goods" under UCC § 2-327 and, hence, there was "acceptance" of home furnishings by buyers. Valley Bank & Trust Co. v Gerber (1974, Utah) 526 P2d 1121, 15 UCCRS 1035.

In buyer's action for seller's breach of written and oral warranties in sale of marine diesel engine, (1) where terms of sale contract were contained in seller's letter to buyer, buyer's written purchase order, and manufacturer's written warranty which accompanied sale of engine; (2) where seller also orally warranted to buyer that engine would deliver specified standard of performance, that if it did not do so it could be removed from buyer's boat at seller's expense, and that it would be delivered in time to meet requirements of builder of buyer's boat; (3) where such oral warranties were breached and buyer, within six-months period provided in written engine warranty for manufacturer's repair or replacement of defective parts, refused to allow manufacturer's mechanic to inspect defective engine; (4) where buyer, more than six months after date engine was put into operation, notified seller that he had removed engine from his boat, tendered engine back to seller, and demanded return of purchase price; and (5) where such tender and demand were refused by seller, (1) trial court properly found that all terms of sale contract had not been reduced to writing; (2) admission in evidence of oral warranties as part of sale contract did not violate parol evidence rule contained in UCC § 2-202; (3) such oral warranties did not constitute "sale or return" provision in contract under UCC § 2-326(1)(b), but were analogous to "sale on approval" provision under UCC § 2-326(1)(a) and thus were not required by UCC § 2-326(4) to be in writing; (4) buyer's failure to allow seller to exercise right under UCC § 2-508(1) to inspect and repair engine negated warranty provisions of sale contract; (5) buyer accepted engine under UCC § 2-327(1)(b) by not seasonably notifying seller of buyer's election to return engine; and (6) buyer's delay of nearly six months in informing seller of buyer's intention to revoke acceptance of engine was insufficient compliance with buyer's good faith obligation under UCC § 1-203 and did not revoke such acceptance under UCC § 2-608. Peter Pan Seafoods, Inc. v Olympic Foundry Co. (1977, 17 Wash App 761, 565 P2d 819, 21 UCCRS 123).

Sale on approval did not relieve buyer of liability for purchase of truck under UCC § 2-327 where buyer used truck beyond approval period without complaining and without offering to return truck. Delaware Valley Equipment Co. v Granahan (1976, ED Pa) 409 F Supp 1011, 19 UCCRS 112 (applying Pennsylvania law).

UCC

§ 2-328 Sale by Auction

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

HISTORY:

Add, L 1962, ch 553, eff Sept 27, 1964.

PRIOR COMPARATIVE LAW:

Pers PL § 102, and cases cited thereto.

UNIFORM LAWS COMMENT:

Prior Uniform Statutory Provision:

Section 21, Uniform Sales Act.

Changes:

Completely rewritten.

Purposes of Changes:

To make it clear that:

1. The auctioneer may in his discretion either reopen the bidding or close the sale on the bid on which the hammer was falling when a bid is made at that moment. The recognition of a bid of this kind by the auctioneer in his discretion does not mean a closing in favor of such a bidder, but only that the bid has been accepted as a continuation of the bidding. If recognized, such a bid discharges the bid on which the hammer was falling when it was made.
2. An auction "with reserve" is the normal procedure. The crucial point, however, for determining the nature of an auction is the "putting up" of the goods. This Article accepts the view that the goods may be withdrawn before they are actually "put up," regardless of whether the auction is advertised as one without reserve, without liability on the part of the auction announcer to persons who are present. This is subject to any peculiar facts which might bring the case within the "firm offer" principle of this Article, but an offer to persons generally would require unmistakable language in order to fall within that section. The prior announcement of the nature of the auction either as with reserve or without reserve will, however, enter as an "explicit term" in the "putting up" of the goods and conduct thereafter must be governed accordingly. The present section continues the prior rule permitting withdrawal of bids in auctions both with and without reserve, and the rule is made explicit that the retraction of a bid does not revive a prior bid.

Cross Reference: Point 2: Section 2-205.

Definitional Cross References:

"Buyer". Section 2-103.

"Good faith". Section 1-201.

"Goods". Section 2-105.

"Lot". Section 2-105.

"Notice". Section 1-201.

"Sale". Section 2-106.

"Seller". Section 2-103.

NEW YORK ANNOTATIONS:

(1) *Sale in lots. Accord* with Personal Property Law, § 102(1).

(2) *When sale complete.* The first sentence of this subsection follows Personal Property Law, § 102(2). The provision made in the second sentence in connection with bids made while the hammer is falling is new, and no cases were found on the point.

(3) *"With reserve".* Subsection (3) also follows Personal Property Law, § 102(2) in presuming that auction sales are "with reserve" unless explicitly announced to be "without reserve". Comment 2 indicates that the "crucial point" is the "putting up" of the goods, and this accords with Benjamin v First Citizens Bank & Trust Co. of Utica, 248 App Div 610, 287 NYS 947 (1936) (goods may be withdrawn before bidding even where sale advertised as "without reserve"). The rule on the bidder's power to retract his bid even in an auction "without reserve" also follows Personal Property Law, § 102(2).

(4) *Bids by seller.* Subsection (4) follows Personal Property Law, § 102(4), in permitting the buyer to avoid an auction sale at which the seller or his agent bid and where no notice of such a right to bid was given at the sale. Cf. United Industrial Syndicate, Inc. v Aetna Industrial Corp. (1950, Sup) 99 NYS2d 375 (although no "announcement" was made, sale was not voidable since failure to state [illegible] and everyone present knew that owners were bidding).

The Code adds a new right in the buyer at such a sale to take the goods at the last good faith bid prior to the completion of the sale. Note that the Code also newly excepts from the entire subsection bids at a "forced sale," which is not otherwise defined. See Drew v John Deere, 19 AD2d 308, 241 NYS2d 267 (1963).

Historical Note:

Subsections (3) and (4) were revised at the suggestion of the Law Revision Commission. The changes in subsection (3) incorporate the rule stated in Comment 2, that the seller may withdraw the goods even after announcing an auction without reserve until the goods are "put up"; they also restore the rule of the Uniform Sales Act that a bidder may retract his bid before the hammer falls even in an auction without reserve. The changes in subsection (4) clarified the prohibition on seller bidding. (1956 Recommendations, p. 49; Excerpts, p. 380).

CROSS REFERENCES:

Auctioneer's memorandum equivalent to note of contract or sale, CLS Gen Oblig Law § 5-701(6).

RESEARCH REFERENCES AND PRACTICE AIDS:

54 NY Jur, Secured Transactions §§ 285–288.
13 Carmody-Wait 2d, Establishment and Enforcement of Liens on Personal Property § 84:126.
7 NY Jur 2d, Auctions and Auctioneers §§ 1–24, 26–37.
7 Am Jur 2d, Auctions and Auctioneers §§ 15, 20 et seq.
31 Am Jur 2d, Executions § 364.
3 Am Jur Legal Forms 2d, Auctions and Auctioneers §§ 31:44 et seq.
18 Am Jur Legal Forms 2d, Article 2—Sales, Forms 253:1091–253:1103.
6 Am Jur Pl & Pr Forms (Rev ed), Sales, Forms 2:301 et seq.

Annotations:

Title to goods, as between purchaser from, and one who entrusted them to, auctioneer. 36 ALR2d 1362.
Withdrawal of property from auction sale. 37 ALR2d 1049.
Liability of auctioneer. 80 ALR2d 1237.
Liability of defaulting purchaser to owner's broker or auctioneer. 30 ALR3d 1395.

CASE NOTES

An auction with reserve is the normal procedure. Drew v John Deere Co. (1963, 4th Dept) 19 AD2d 308, 241 NYS2d 267, 2 UCCRS 519.

A statement that the goods would be sold to the highest bidder is not the equivalent of a sale without reserve, and is nothing more than an announcement that a person will sell his property at an auction at which bids will be received. Drew v John Deere Co. (1963, 4th Dept) 19 AD2d 308, 241 NYS2d 267, 2 UCCRS 519.

If an auction sale is with reserve the seller may purchase and hence the person making the next highest bid cannot contend that the seller is disqualified and such disqualification makes him the highest bidder whose bid must be accepted. Drew v John Deere Co. (1963, 4th Dept) 19 AD2d 308, 241 NYS2d 267, 2 UCCRS 519.

Nothing in the Uniform Commercial Code (see UCC §§ 2-328(1) and 2-307) gives an auctioneer the right to condition delivery of one lot of goods sold at an auction sale on the payment of all lots purchased at such sale where the sale is made in the ordinary course of business. Dulman v Martin Fein & Co. (1978, 2d Dept) 66 AD2d 809, 411 NYS2d 358, 25 UCCRS 431.

Condition of auction sale imposed by paragraph in instrument stating terms of such sale, which provided that sale was subject to "confirmation of the assignee or attorney and the secured party," was reasonable and was not precluded by UCC § 2-328(2). Dulman v Martin Fein & Co. (1978, 2d Dept) 66 AD2d 809, 411 NYS2d 358, 25 UCCRS 431 (holding that Uniform Commerical Code mandates liberal construction of UCC § 2-328(2)).

UCC § 2-328 defining sale by auction does not mean that one cannot enter sales contract or agreement of sale by way of auction; or that where all other incidents of auction are present, transaction is not auction if title is not transferred upon hammer's fall. Hawaii Jewelers Asso. v Fine Arts Gallery, Inc. (1970) 51 Hawaii 502, 463 P2d 914, 7 UCCRS 296.

The Code continues the prior law under which title to property sold at an auction sale passes to the bidder and the sale is complete when the property is knocked down to the bidder. Diefenbach v Gorney (1968) 93 Ill App 2d 51, 234 NE2d 813, 5 UCCRS 491.

In an auction sale, particularly of farm crops, a tender of delivery of the goods is not a condition precedent to the obligation to pay. Diefenbach v Gorney (1968) 93 Ill App 2d 51, 234 NE2d 813, 5 UCCRS 491.

Municipal ordinance requiring auctioneer to refund in full purchase price when demand is made within 72 hours after purchase, provided purchaser returns article or merchandise to place of purchase in same condition as when purchased did not conflict with UCC § 2-328 which was intended to resolve finality of auction sale question, as between parties involved, when bid is made while hammer is falling. B. Jeselsohn, Inc. v Atlantic City 1976) 70 NJ 238, 358 A2d 797, 19 UCCRS 497.

The auctioneer is merely the agent of the parties and is not the buyer with respect to the original seller, nor the seller with respect to the ultimate buyer. Tulsa Auto Dealers Auction v North Side State Bank (1966, Okla) 431 P2d 408.

The fact that the auctioneer has the right to commissions in the sale made by him does not give him any proprietary interest in the goods themselves so as to give him a standing superior to a creditor who has a security interest in the goods. Tulsa Auto Dealers Auction v North Side State Bank (1966, Okla) 431 P2d 408.

UCC § 2-328(2) is inapplicable to a sale of land by auction, since Article 2 of the UCC is applicable only to goods. Hoffman v Horton (1972) 212 Va 565, 186 SE2d 79, 10 UCCRS 338.

In action for specific performance of contract for sale of well-drilling equipment, where such equipment was "struck off" at auction sale to buyer, sale under UCC § 2-328(2) was complete, as a matter of law, at fall of auctioneer's hammer. Bullock v Joe Bailey Auction Co. (1978, Utah) 580 P2d 225, 24 UCCRS 319.

This section contains approximately the same language as that found in the Pennsylvania Sales Act provision governing auction sales, which provided that a sale by auction was complete when the auctioneer announced its completion by the fall of the hammer, or another customary manner. Guaranty Trust Co. v Williamsport Wire Rope Co. (1955, CA3 Pa) 222 F2d 416.

A seller could withdraw a horse from an auction sale even after the fall of the hammer, but only before the horse was taken from the sale ring; when this horse was taken from the ring after being sold, all title and interest passed to the purchaser, regardless of the delivery or nondelivery of papers providing evidence of ownership. Bradshaw v Thompson (1972, CA6 Tenn) 454 F2d 75, 10 UCCRS 641, cert den 409 US 878, 34 L Ed 2d 131, 93 S Ct 130 (applying Tennessee law).

PART 4

Title, Creditors and Good Faith Purchases

§ 2-401. Passing of Title; Reservation for Security; Limited Application of This Section
§ 2-402. Rights of Seller's Creditors Against Sold Goods
§ 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

HISTORY:

Add, L 1962, ch 553, eff Sept 27, 1964.

§ 2-401. Passing of Title; Reservation for Security; Limited Application of This Section

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the

Cross References

Unlawful bingo or lotto games, see General Municipal Law § 495.

New York Codes, Rules and Regulations

Use of games of chance in selling commodities, see 19 NYCRR Part 132.

Library References

Trade Regulation ⟹878.
C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 239.

Notes of Decisions

Criminal liability 2
Lottery tickets 1

1. Lottery tickets

The free distribution by a business corporation of Olympic lottery tickets to promote sales or services may be subject to the provisions of this section. 1978, Op.Atty.Gen. July 31.

2. Criminal liability

Notwithstanding compliance with the requirements of this section, the operation of the "Gamerama" contest by a profit-seeking commercial establishment is a misdemeanor pursuant to General Municipal Law § 495. 1977, Op.Atty. Gen. 18.

§ 369-ee. Prize award schemes

1. Unless written disclosure is made as provided in subdivision two of this section, it shall be unlawful for any person, firm or corporation to offer a consumer a prize, in writing, as part of any advertising or sales promotion plan, if in order to claim the prize, the consumer must submit to a sales presentation.

2. Such written disclosure must be furnished to the consumer at the time he is notified of the prize and must be written or printed in a size equal to at least ten-point bold type. The written disclosure must contain all of the following: (a) a full description of the exact prize won by the consumer including its cash value; (b) all terms and conditions attached to the prize; (c) a statement that the consumer must submit to a sales presentation; (d) a full description of the product, real estate, investment, services, membership or any other item to be offered for sale, including the price of the least expensive and the most expensive item or parcel.

3. Upon any violation of this section, an application may be made by the attorney general in the name of the people of the state to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of the violation. If it shall appear to the satisfaction of the court or justice that the defendant has violated this section, an injunction may be issued by the court or

justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may make allowances to the attorney general as provided in paragraph six of subdivision (a) of section eighty-three hundred three of the civil practice law and rules, and direct restitution. Whenever the court shall determine a violation of this section has occurred, it may impose a civil penalty of not more than one thousand dollars for each violation. In connection with an application made under this subdivision, the attorney general is authorized to take proof and to make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

4. The obligations imposed by this section shall be in addition to and not in derogation of the requirements of any other law.

(Added L.1982, c. 851, § 1; amended L.1982, c. 852, § 1.)

Historical Note

1982 Amendment. Subd. 1. L.1982, c. 852, § 1, eff. on the 90th day after July 27, 1982, inserted ", firm or corporation".

Effective Date. Section effective on the 90th day after July 27, 1982, pursuant to L.1982, c. 851, § 2.

Library References

Consumer Protection ⟹4, 6.
C.J.S. Trade-Marks, Trade-Names and Unfair Competition §§ 237, 238.

[§§ 369-f, 369-g. Renumbered 369-d, 369-e]