

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 05-182

Consequences of Advertising an "Absolute Auction"

QUESTIONS

1. May an owner of real property that has been advertised for sale at "absolute auction" either withdraw the property from the sale or change the terms of the auction to add a reserve before the auctioneer has called for bids?

2. If an auction company, intending to conduct an absolute auction, has advertised an absolute auction but the owner modifies the terms prior to the sale to add a reserve and the modified terms are announced before bids are accepted:

(a) Would proceeding with the auction with reserves be a "substantial misrepresentation" in violation of Tenn. Code Ann. § 62-19-112(b)(1) or (b)(2) subjecting the auction company's license to suspension or revocation?

(b) Would such actions or advertisements be a violation of Rule 0160-1-.20 (Advertising Guidelines) of the Tennessee Auctioneer Commission?

3. If an auction company, intending to conduct an absolute auction, advertises that a sale will be absolute and if the written advertisement contains a notice stating that "announcements made at the time for the auction will take precedence over all prior advertising statements," would the advertisement be a misrepresentation under Tenn. Code Ann. § 62-19-112 or Rule 0160-1-.20 of the Tennessee Auctioneer Commission if an announcement was made, prior to taking bids, that the sale was being changed to one with reserves?

4. Would the conduct described in any of the above situations violate any other rule or statute?

OPINIONS

1. Yes. Even though real property has previously been advertised for sale at absolute auction, the owner ordinarily may withdraw the property from sale or change the terms to add a reserve before the auctioneer calls for bids.

- 2(a). No.
- 2(b). No.
- 3. No.
- 4. No, such conduct would not violate any statute or rule of which this Office is aware.

ANALYSIS

1. The first question is whether, when an auction has been advertised as “absolute,” the owner may withdraw the property from the sale or change the terms to add a reserve, so long as he or she does so before the auctioneer has called for bids. Under general authorities, as well as the case law on the point in Tennessee, the answer is that an owner may do so. An “absolute auction” is defined by Auctioneer Commission Rule 0160-1-.19 as “[a]n auction at which property put up for sale is sold to the highest bidder, where the seller may not withdraw the property from the auction after the auctioneer calls for bids unless no bid is made in a reasonable time, where the seller may not bid himself or through an agent, and where the seller will deliver marketable title.” The rule also indicates that the term “absolute auction” is interchangeable with the term “auction without reserve.” “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.” Tenn. Code Ann. § 47-2-328 (2001). While this provision of the Uniform Commercial Code applies only to the sale of goods, it does demonstrate the general principles that govern auctions of real estate as well.

This Office has previously opined “that an advertisement of an auction is not an offer to sell which becomes binding, even conditionally, on the owner when a bid is made, but is a mere declaration of intention to hold an auction at which bids will be accepted.” Op. Tenn. Att’y Gen. addressed to John C. Neff (July 10, 1981) (citing *Moore v. Berry*, 288 S.W.2d 465 (Tenn. Ct. App. 1955)). “[T]herefore, the advertisement of an ‘absolute auction’ would simply be a declaration of an intention and not binding on either the seller or the owner.” *Id.* The owner of the property may therefore withdraw his or her property from the sale before the auction begins, although the owner may then owe contractual damages to the auctioneer with whom the contract to sell was made. *See generally Alexander v. Hopkins*, 1998 WL 440743 (Tenn. Ct. App. 1998). Such damages would be determined by the specific terms of the contract involved and the specific facts.

“It is the right of the owner of the property sold at auction to prescribe . . . the manner, conditions, and terms of sale.” Op. Tenn. Att’y Gen. addressed to John C. Neff (July 10, 1981) (citing *Moore v. Berry*). A comment to the Uniform Commercial Code states that “[t]he prior announcement of the nature of the auction either as with reserve or without reserve will . . . enter as an ‘explicit term’ in the ‘putting up’ of the goods and conduct thereafter must be governed accordingly.” Tenn. Code Ann. § 47-2-328, Comment 2. This same comment indicates, however, that the U.C.C. “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.” *Id.*

The U.C.C., while stating that the announcement of the terms of an auction is binding, does not explicitly address whether a later announcement shortly before the auction commences may modify the previously announced and advertised terms. The point is addressed, however, by the Restatement of Contracts, which states,

Unless a contrary intention is manifested, bids at an auction embody terms made known by advertisement, posting or other publication of which bidders are or should be aware, as modified by any announcements made by the auctioneer when the goods are put up.

RESTATEMENT 2d OF CONTRACTS §28(2) (1981). It is noted in 7 Am.Jur.2d *Auctions & Auctioneers* §16 (1980 & Supp. 1991), that these principles are derived from the common law, although there is some contrary authority. See 7 Am.Jur.2d *Auctions & Auctioneers* §18 (1997) (stating, “The courts differ as to the effect of a parol modification by the auctioneer, at the time of the sale, of terms previously announced in a written or printed notice of sale.”). To the extent of the scant Tennessee authority, this State seems to follow the apparent majority rule. In *Moore v. Berry*, the auction in question had been widely advertised without mention of a reserve, but before calling for bids the auctioneer announced terms that did include the owner’s right of reservation. 40 Tenn. App. 1, 5-6, 288 S.W.2d 465, 466-67. The court cited the general rule, as then stated in 5 Am.Jur. *Auctions & Auctioneers* §15, that terms and conditions announced “at the time and place appointed for the auction . . . generally are deemed to supersede all others and to bind the purchaser, even though he did not hear or understand the announcement or was not present at the time of the announcement” *Moore v. Berry*, 40 Tenn. App. 9, 288 S.W.2d 468. From that, the court concluded, “It seems to be a settled rule in this state as well as elsewhere that conditions prescribed by the seller or owner and announced at the time and place of the auction are binding on the purchaser whether or not he knew or heard them.” *Id.* Thus, the court held that the reservations as announced at the auction governed the terms of the sale.

In *Lawrence Paper Co. v. Rosen & Co.*, 939 F.2d 376 (6th Cir. 1991), the Sixth Circuit, while ruling in a case from Ohio, outlined the “legal understandings implicit in a sale by auction,” quoting freely from American Jurisprudence 2d. Relying on the Restatement quoted above, the court found that “the weight of authority is that, even if some inconsistency existed between the advertised terms and the announcement made orally at the auction, the latter prevails.” 939 F.2d 379. Moreover, this view seems consistent, not only with the positive law enacted by the U.C.C., but with the general notion that, even at an auction without reserve, the goods may be withdrawn from the sale at any time before the auctioneer calls for bids. The alternative would be a rule requiring owners and their auctioneers to withdraw property from an auction entirely, or go forward even though the terms announced earlier are no longer desirable. The effect of such a rule would be to require the owner to withdraw the land and conduct a *new* auction. Such a result would require landowners and auctioneers to incur additional expenses merely to leap through formalistic hoops to achieve the same result.

2(a). This conclusion essentially answers the remaining questions posed. If an auction company, consistent with the owner's stated intent, advertises a sale as an absolute auction, but then is directed before calling for bids to announce a reserve, under the law the auction becomes one with reserve. Obviously, the auction company has not made a "substantial misrepresentation" in violation of Tenn. Code Ann. § 62-19-112(b)(1) or (b)(2), since the advertisements were made in a manner consistent with the owner's then-stated intent. If the auctioneer advertises the auction as without reserve, intends to administer it as such, and is unaware of the property owner's pending decision to alter that arrangement, then any representation that the auction is without reserve is not a misrepresentation of any material fact then known. Proceeding with the auction under different terms would not make the previous advertisement a misrepresentation. That the owner later had a change of mind does not mean that the auction company has made any misrepresentation at all, especially since it appears that the owner had a right to change the terms at the last minute.

2(b). Subsections (2)(a-d) of Rule 0160-1-.20 of the Tennessee Auctioneer Commission state that

advertising shall be deemed to be false, deceptive, misleading, or untruthful if it:

- (a) contains a misrepresentation of fact.
- (b) is misleading or deceptive because in its content or in the context in which it is presented, it makes only a partial disclosure of relevant facts.
- (c) creates a false or unjustified expectation of the services to be performed.
- (d) contains any representation or claim that the advertising licensee in bad faith fails to perform.

Such advertising is "expressly prohibited" by the Rule. For the reasons stated in Part 2(a) supra, there would be no violation of this rule under the stated facts. The expectations created by the advertisement may go partially unfulfilled, but if the auctioneer is proceeding from a good faith understanding with the seller, then the expectations at the time the advertisement is put forward are neither false nor unjustified. The auction company would only be acting in "bad faith" under subsection (d) if it learned of the changed circumstances and did not alter its advertising or other behavior with respect to the coming auction.

3. Under the law as stated above, it would obviously be appropriate for an auction company to include in its advertisements a statement that announcements made at the time of the auction take precedence over prior announcements. This provision would be in accordance with the legal rights of the owner of the property. Accordingly, such a course would not amount to a misrepresentation under any statute or rule.

Page 5

4. This Office is not aware of any rule or statute which the described conduct would violate.

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