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By Andrew Keshner  
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## Panel Says Auction House Lacks Documents to Demand Payment

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### Case Digest Summary

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Rebuffing an auction house's claim that it had been merely following common practice, a Brooklyn-based appellate court has ruled that the business cannot demand \$400,000 from a successful bidder because it lacked proper written documentation of the transaction.

The Appellate Division, Second Department, on Sept. 19, threw out a lawsuit by William J. Jenack Estate Appraisers and Auctioneers against absentee bidder Albert Rabizadeh, the successful bidder on a 19th-century "fine Russian silver/enamel covered box with gilt interior."

Reversing the lower court, the Second Department held documentation of the sale did not adequately identify the consignor of the item in accordance with a provision of General Obligations Law.

"Here, the notation that the subject antique was sold by '#428' was insufficient to satisfy the statutory requirement that the memorandum contain 'the name of the person on whose account the sale was made,'" Justice Peter Skelos ([See Profile](#)

([http://judges.newyorklawjournal.com/profile/Appellate\\_Division\\_Second\\_Department/Peter\\_Skelos/Peter\\_Skelos-100162.xml](http://judges.newyorklawjournal.com/profile/Appellate_Division_Second_Department/Peter_Skelos/Peter_Skelos-100162.xml))) wrote for the panel in *William J. Jenack Estate Appraisers and Auctioneers v. Rabizadeh* ([http://www.nycourts.gov/reporter/3dseries/2012/2012\\_06211.htm](http://www.nycourts.gov/reporter/3dseries/2012/2012_06211.htm)), 2010-08747, quoting *General Obligations Law §5-701(a)(6)* (<http://codes.lp.findlaw.com/nycode/GOB/5/7/5-701>).

Skelos rejected the Chester-based auction house's argument it was "common practice" not to disclose names of consignors, with such information being "unnecessary."

"While it may be true that auction houses commonly withhold the names of consignors, this Court is governed not by the practice in the trade, but by the relevant statute, which it is bound to apply in accordance with the foregoing rules of construction," said Skelos.

He was joined by Justices John Leventhal ([See Profile](#)

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([http://judges.newyorklawjournal.com/profile/Appellate\\_Division\\_Second\\_Department/Ariel\\_Belen/Ariel\\_Belen-100011.xml](http://judges.newyorklawjournal.com/profile/Appellate_Division_Second_Department/Ariel_Belen/Ariel_Belen-100011.xml))) and Sheri Roman ([See Profile](#)

([http://judges.newyorklawjournal.com/profile/Appellate\\_Division\\_Second\\_Department/Sheri\\_Roman/Sheri\\_Roman-100149.xml](http://judges.newyorklawjournal.com/profile/Appellate_Division_Second_Department/Sheri_Roman/Sheri_Roman-100149.xml))). The panel heard arguments on Nov. 28, 2011.



The auction at issue occurred in September 2008; prior to the event, Rabizadeh sent in an absentee bid form saying he wanted to bid on the antique box by phone. The form Rabizadeh signed advised bidders that payment on sales were due within five days after the auction.

Although Rabizadeh got an invoice, he never sent back a payment or took possession of the item, which stayed at the auction house's storage facility.

Jenack sued Rabizadeh on claims including breach of contract but Rabizadeh countered the alleged contract was unenforceable.

In November 2009, then-Orange County Supreme Court Justice David Ritter denied Rabizadeh's motion for summary judgment dismissal and instead granted Jenack's summary judgment motion.

Jenack was awarded \$402,398 in a subsequent damages trial before Supreme Court Justice Catherine Bartlett.

The Second Department reversed in a decision that turned on the language of General Obligations Law §5-701, New York's version of the statute of frauds, which requires a signed writing for certain kinds of contracts.

General Obligations Law §5-701(a)(6) states that if an item is sold at a public auction, essential elements of a valid sale include "a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale was made."

Here, the entry on the auction house's "clerking sheet" showed the item was put up by "consignor number 428" with handwritten notes showing bidder number 305; the number assigned to Rabizadeh; putting in the top bid.

In the underlying case, the auction house did not name the person behind consignor number 428, as Skelos pointed out.

Rabizadeh argued the auction house's memorandum on its clerking sheet was defective because it neither named the purchaser nor the consignor.

Skelos noted case law allowed the contract's essential terms to be laid out in various writings; at least one document had to establish the contractual relationship between the parties and be signed by the party to be charged, he said.

Viewing the clerking sheet in conjunction with the absentee bidder form, Skelos said the memorandum satisfied the requirement for the purchaser's name.

But he disagreed with the auction house's view that the mention of the consignor's assigned number on the clerking sheet was adequate to fulfill "the name of the person on whose account the sale was made."

Skelos said the law "unambiguously requires" the name of the consignor with it generally being held that parties must be identified to satisfy the statute of frauds.

Skelos noted cases allowing marks or other designations to be used as signatures, so long as the marks were made by the parties to serve as their signatures.

"In such cases, however, the mark or designation is associated with an identifiable person... The difficulty in this case arises not merely from the use of a number in place of a name, but from the fact that the person associated with that number was never identified," he said.

Furthermore, Skelos added, the notation "#428" was not made by the consignor with the aim of executing the contract.

"The auctioneer's memorandum is deemed to be a subscribed writing where all of the specifications of General Obligations Law §5-701(a)(6), including the inclusion of the name of the person on whose account the sale was made, are met," said Skelos.

Noting possible burdens from the requirement, Skelos said, "a change in the law to eliminate that requirement may be warranted. However, consideration of the propriety of that change is not for the courts, but rests with the Legislature."

Rabizadeh was represented by Daniel R. Wotman & Associates in Great Neck.

The plaintiffs were represented by Benjamin Ostrer of Ostrer & Hoovler in Chester and Cynthia Dolan, who was with the firm at the time but has since become of counsel at Boeggeman, George & Corde.