Gershman v. Manitoba (Vegetable Producers' Marketing Board), [1975] M.J. No. 190

Manitoba Judgments

Manitoba Court of Queen's Bench
Solomon J.
November 27, 1975.

[1975] M.J. No. 190 | 65 D.L.R. (3d) 181 | [1976] 2 W.W.R. 432

Between Lewis Gershman, plaintiff, and Manitoba Vegetable Producers' Marketing Board, defendant

(19 paras.)

Counsel

[Quicklaw note: Counsel for the plaintiff illegible in photocopy received by QL.] Vern Simonson, for the defendant.

SOLOMON J.

1 Plaintiff, one of the principal owners of Gershman Produce Co. Ltd., instituted this action against defendant, claiming that defendant, without justification, interfered in contractual relations between plaintiff and Stella Produce Co. Ltd. (herein referred to as Stella Company) and, as a result, plaintiff suffered damages.

2 Plaintiff's father organized a wholesale fruit and vegetable company and operated it for over twenty years in the City of Winnipeg under the name of Gershman Produce Co. Ltd. (Gershman Company). Plaintiff grew up with his father's business and graduated in Civil Engineering, after which he went to work for Imperial Oil Co. In 1967 his father died and plaintiff left Imperial Oil and took over the management of Gershman Company. He operated it with his sister until March 18, 1974, when fire destroyed the warehouse, together with stock-in-trade, supplies, and all records. After the fire, plaintiff went to work for Stella Company at $250.00 per week and his sister went to work for Jobbers Fruit Wholesale.

3 Defendant is a producers' marketing board composed of some 10 members elected by vegetable producers in Manitoba under the provisions of The Natural Products Marketing Act, R.S.M. 1970, Cap. N20. This board has exclusive jurisdiction to administer buying and selling some five or six different vegetables produced in Manitoba, including potatoes and carrots. In other words, with the exception of direct sales by producers from their vegetable stands, no one has the right to buy or sell the named vegetables except through defendant board. The board has the power to make rules and regulations which, under the Act, have the effect of law as though made by Order-in-Council. Although the board has power to make rules and regulations

governing the buying and selling of vegetables, it does not have the power to enforce them. Under the provisions of The Natural Products Marketing Act, a marketing commission was established whose duty, inter alia, was to enforce the regulations of the board. The members of the marketing commission are appointed by The Government of Manitoba. It has its own inspectors and other necessary administrative personnel to police and enforce the regulations made by the board. Although the board is composed of some 10 elected members, it is, in a practical sense, governed by the three-member Executive Committee composed of Chairman, Vice-Chairman and Secretary. None of these executive members are full time employees of the board. The board has a general manager and full time staff to operate its business. The Executive Committee recommends and oversees the execution of board policy. The evidence clearly indicates the secretary is the most active member of the executive and by far the most knowledgeable and influential member, not only of the Executive Committee but of the whole board.

4 In 1971, plaintiff's firm, Gershman Company, in an action involving defendant board or its predecessor, challenged the constitutionality of The Natural Products Marketing Act. Gershman Company lost the case and paid the costs assessed against it. In 1973, the Marketing Commission, as enforcing body of defendant's orders, instituted proceedings against Gershman Company, claiming it had in its possession potatoes not purchased through the board. Gershman Company pleaded guilty and paid the fine imposed, thinking that this was the end of the matter. Shortly thereafter another charge was laid charging Gershman Company of selling the same potatoes. This charge was dismissed for want of prosecution. The matter, however, did not end there. Another charge was laid against Gershman Company for moving the same potatoes out of the warehouse without the board's permission. The Provincial Judges Court dismissed the charge on the ground that it appeared from the evidence adduced that the potatoes had to be moved and destroyed because they were rotten. This verdict was appealed by way of a trial de novo to the County Court and eventually proceedings were stayed at the request of the Crown.

5 Gershman Company was licensed by the Federal Department of Agriculture to operate the wholesale business of buying and selling fruits and vegetables. It held a licence for over 20 years without interruption until the fire on March 18, 1974. Under the Produce Licensing Regulations of the Federal Government, fruit and vegetable wholesalers who do not comply with requirements thereunder have to post a bond before a licence will be issued to them. During these 20 years of operation, Gershman Company was not required to post a bond with the Federal Department. At the time of the fire, Gershman Company was indebted to the defendant board in an amount of approximately $25,000.00. Four days after the fire, defendant filed a petition in the Court of Queen's Bench asking that Gershman Company be declared bankrupt. The petition was dismissed. Shortly thereafter, without waiting for insurance money to be paid, plaintiff remitted to defendant $10,000.00 on account of the latter's claim.

6 Following dismissal of the petition, Gershman Company started to reconstruct their accounts payable and receivable without, of course, assistance from records destroyed in the fire. This resulted in Gershman Company settling its accounts receivable for much less than expected and its accounts payable for much more. When Gershman Company collected its accounts receivable and the insurance money, it did not have enough to pay every creditor 100 cents on the dollar. At that point in time, Gershman Company wrote its unsecured creditors offering to pay 70 cents on the dollar. When defendant received this letter, instead of replying it immediately filed another petition in bankruptcy. Defendant knew that Gershman Company had a firm of solicitors representing it, but instead of communicating with them, defendant, on an ex

parte application, obtained an interim order of receivership. The matter did not proceed beyond that stage. Defendant was paid in full and proceedings were stayed.

7 While proceedings between defendant and Gershman Company were still pending, plaintiff, on the invitation of Harry Rubenfeld, the principal owner of Stella Company, went to work for that company at $250.00 a week. Harry Rubenfeld's father, the other major shareholder, wanted to sell his share and retire from the business. Harry Rubenfeld, who was well acquainted with plaintiff, invited plaintiff to buy his father's share and join him in the operation of Stella Company. They did not settle details of the sale price as that would be determined only after the financial statement for the year 1974 had been finalized. They agreed that the investment portion of the assets of the company would be withdrawn and the plaintiff would be buying the father's shares at the price they were worth at the end of 1974, after the investments had been withdrawn from the company. Harry Rubenfeld informed plaintiff he expected the shares would be worth between $35,000.00 and $50,000.00. The estimated purchase price of the shares was evidently given to plaintiff for the purpose of indicating to him how much money he needed to complete the transaction. In the meantime, it was agreed that plaintiff would start working for Stella Company as warehouse foreman at a salary of $250.00 per week.

8 Plaintiff started to work in the spring and continued until the fall of 1974, at which time Harry Rubenfeld was forced to discharge him. There were no problems between plaintiff and Harry Rubenfeld to warrant the dismissal. The actions of the defendant board on August 26th forced Rubenfeld to discharge plaintiff and cancel the arrangement regarding selling the shares to him. On August 26th, defendant board passed a resolution that until defendant's account of $15,000.00 was paid in full, the board would not provide credit to any customer of the board employing a principal of Gershman Company in a responsible position. Following the passage of this resolution, the Secretary of the board notified Stella Company that because it was employing plaintiff, all future shipments to Stella Company would be on a C.O.D. basis and next day shipments to Stella Company started to arrive on a C.O.D. basis. This action of the board immediately became common knowledge among wholesale competitors. Harry Rubenfeld held a meeting with his father and the only other shareholder of Stella Company that same day and they decided they could not operate on such a basis and successfully compete with other distributors. Harry Rubenfeld said that Stella Company had no alternative but to discharge plaintiff and cancel the arrangements for the sale of shares to him. Immediately plaintiff was discharged, the board rescinded the C.O.D. ruling against Stella Company and reinstated it on the regular charge basis.

9 It should be noted that this was not the end of defendant's actions against Gershman Company. Plaintiff's sister, together with Harry Rubenfeld, purchased a firm called Jobbers Fruit for whom she went to work. Men defendant board became aware of this, it passed a resolution to put Jobbers Fruit on a C.O.D. basis. Before the sale of Jobbers Fruit to plaintiff's sister and Harry Rubenfeld, it enjoyed a good credit rating. Court was not told what the financial position of Jobbers Fruit was before the sale but it was not on a C.O.D. basis. Immediately after the sale to plaintiff's sister and Harry Rubenfeld, Jobbers Fruit was placed on a C.O.D. basis despite the fact that the principal owner of this firm was also the principal owner in Stella Company, a firm with a net equity balance of some $250,000.00, according to the auditors' report. There are some seven or eight fruit and vegetable wholesalers in Winnipeg who are customers of defendant and the only firms forced to operate on a C.O.D. basis were Stella Company and Jobbers Fruit, both of whom were employing members of the Gershman family. This decision of the board in respect of Jobbers Fruit was in keeping with its decision of August 26, 1974, that any firm who was a customer of the board employing a member of the Gershman family would

be placed on a C.O.D. basis. The Secretary of the board, in giving evidence in court, wanted the court to believe that this C.O.D. action against the two firms was done for the purpose of protecting producers against financial loss, and the fact that it was imposed only on firms that employed members of the Gershman family was a mere coincidence. The Secretary offered additional explanation for good measure. He stated the board was afraid the Federal Licensing Department might cancel the licence of Stella Company if it continued to employ plaintiff. Stella Company was not afraid of losing its licence but the board, who had nothing to do with licensing, was. According to the Secretary, the board adopted this paternalistic attitude towards Stella Company because it was interested in its welfare. The Secretary knew that the Federal Licensing Department had never cancelled a licence of any fruit and vegetable wholesale firm in twenty-five years. He also knew that Stella Company was a well established wholesale with a net equity of about $250,000.00, yet he still recommended to the board that it be placed on C.O.D. in order to save it from catastrophe. If nothing else, such explanations certainly overtaxed the credulity of the court. I say without hesitation that when the evidence of the Secretary conflicts with that of Harry Rubenfeld or plaintiff, I prefer to accept that of the latter two.

10 The mere fact that the Marketing Commission, which acts as enforcing body of defendant's regulations and orders, instituted three prosecutions against Gershman Company in respect of the same potatoes does not, by itself, give rise to plaintiff's action, nor does the mere fact that the board filed two petitions in bankruptcy while Gershman Company was awaiting final adjustment from insurance companies following the fire. These actions, however, do indicate that the resolution by the board to put Stella Company on a C.O.D. basis was not passed because it was afraid or giving too much credit to Stella Company, but because it knew that this action would force Stella Company to terminate plaintiff's employment and cancel the arrangement for the sale of shares.

11 The defendant board was established for the purpose of providing to the producers of vegetables more orderly marketing procedures. To accomplish this worthy end the board was given wide powers. Neither producers nor consumers could deal with certain named vegetables except through the board. The named vegetables are staple food products of every Manitoban. That gives the board exclusive jurisdiction to control products reaching the table of every Manitoban at one time or another. It also imposes on the board great responsibility towards producers, consumers, and towards those who distribute the food products from producer to consumer. I do not want to believe that the board collectively would have knowingly perpetrated such malicious acts against an innocent member of our society just because he dared to disagree. Nonetheless, they were done. If the board allowed such acts to be done in its name then it must take the blame and responsibility for them. There are only some seven or eight fruit and vegetable wholesalers in Winnipeg. It is a closely knit group, each member knowing everything about his competitors. This concerted action by the board succeeded in ostracizing plaintiff from a business in which he grew up from childhood with his father. The Secretary of the board was associated with vegetable growers and distributors for years and from the passing of The Natural Products Marketing Act, he was actively associated with them. He first served on the Marketing Commission and when defendant board was established he became its Secretary. The Secretary knew the actions the board was taking would force Stella Company to discharge plaintiff from employment and ostracize him from the fruit and vegetable wholesale business in Winnipeg. Despite that he recommended to the board that such actions be taken. I am satisfied that as a result of the board's actions, Stella Company discharged plaintiff and cancelled the arrangement to sell the shares to him because Stella Company was afraid of what

might happen if it ignored the board's order. When one takes into consideration what happened to Gershman Company who dared to disagree, Stella Company had good reason to be afraid.

12 The principle of law that interference by a third party with contractual relations between two other parties is actionable was established in 1353 by the decision in the well known case of Lumley v. Gye (1843-60), All E.R. 208, in which Crompton, J., speaking for the court, said (p.211):

> " Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or, as contended by the defendant, an anomaly and an exception from the general rule of law on ouch subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue, and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties. I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service is not actually continuing, can make any difference. The wrong and injury are surely the same whether the wrongdoer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service. I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that such distinction exists."

13 Subsequently, in the case of Temperton v. Russell, (1893) 1 Q.B., 715, the court extended that principle of law to include interference by a third party who prevents the two other parties from entering into a contract. Lord Esher, M. R., at p. 728, said:

> " The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with, the plaintiff can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable."

14 In 1964, Gale, J. (as he then was) of the Ontario High Court, dealt rather exhaustively with the question of liability of a third party for interfering with contractual relations of two other parties in the case of Posluns v. Toronto Stock Exchange and Gardner (1965), 46 D.L.R. (2d) 210. On p. 261 he summarized it as follows:

" While a contract cannot impose the burden of an obligation on one who is not a party to it, a duty is undoubtedly cast upon any person, although extraneous to the obligation, to refrain from interfering with its due performance unless he has a duty or a right in law to so act. Thus, if a person without lawful justification knowingly and intentionally procures the breach by a party to a contract which is valid and enforceable and thereby causes damage to another party to the contract, the person who has induced the breach commits an actionable wrong. That wrong does not rest upon the fact that the intervenor has acted in order to harm his victim, for a bad motive does not per se convert an otherwise lawful act into an unlawful one, but rather because there has been an unlawful invasion of legal. relations existing between others.

This has been established in our jurisprudence by an ever-developing body of authority which had its origin in the great case of Lumley v. Gye (1853), 2 E1.&B1. 216, 118 E.R. 749. Most, if not all, of the relevant judgments following it were cited, and thoroughly discussed with me during the course of the argument at trial, but there is no point in analyzing them individually or collectively at this stage. It will surely be enough to say that while some of the judgments are not susceptible of easy interpretation, perhaps because in many instances they were so elaborate, and others give the appearance of irreconcilability, there can be no doubt that our law recognizes as tortious any unjustifiable and unlawful violation of economic interests which causes harm."

15 In other words, a violation of a legal right committed knowingly is a cause of action, and it is a violation of a legal right to interfere with contractual relations recognized by law if there is no justification for such interference. If the board, by reason of its special influence, induced Stella Company to discharge plaintiff from his employment, and plaintiff suffered damages as a result of such interference, defendant is liable in law for such damages. In order to succeed in his action plaintiff must prove:

(1) That there was a contract between plaintiff and Stella Company, or there was an agreement to enter into a contract;

(2) That defendant knew of the existence of such contract or of an agreement to enter into such contract;

(3) That defendant intended to procure the breach of that contract or intended to prevent the parties from entering into that contract;

(4) That defendant was successful in inducing Stella Company to breach the contract or prevent Stella Company from entering into the contract with plaintiff; and

(5) That the contract was terminated or the parties were prevented from entering into the contract because of the interference of defendant.

16 I now wish to discuss these five requirements which must be established before plaintiff can discharge the onus placed upon him by lair. The evidence clearly establishes that plaintiff and Harry Rubenfeld, the principal owner of Stella Company, entered into a verbal agreement whereby plaintiff agreed that he would buy approximately a one-third share of Stella Company for an amount between $35,000.00 and $50,000.00, and become part owner of Stella Company. Both parties agreed that the final sale price would be determined on the basis of the financial statement of Stella Company for the year ending in 1974. It is true that plaintiff was of opinion that the year end of Stella Company was not December 31, 1974, as it actually was, but sometime earlier in the year. Nonetheless, they were referring to a financial statement of Stella

Company for the year ending in 1974. They further agreed that Harry Rubenfeld's father would retire from the company and plaintiff would buy his shares. Until the final contract of sale was made, plaintiff was to work as warehouse foreman at a salary of $250.00 a week. The formal contract would be entered into when the financial statement of was completed for the year ending in 1974. Plaintiff was able and willing to buy and Stella Company was willing to sell. It is true that final details could not be settled until the financial statement became available, but both parties stated unequivocally that they could not see any reason why the contract could not have been finalized had it not been for the actions of the board. The Secretary of the board and the board itself knew that plaintiff was working for Stella Company as warehouse foreman and that there were arrangements between Stella Company and plaintiff which would have enabled plaintiff to become part owner of Stella Company. I could not find anything in the evidence which would indicate there were other factors in existence which could have prevented the parties from entering into a contract, had it not been for the interference of the board.

17 I am also satisfied that the board issued the C.O.D. order against Stella Company, not for the purpose of safeguarding vegetable producers against financial losses, but for the purpose of coercing Stella Company to sever its relations with plaintiff. The board was indeed very successful in this respect because the father of Harry Rubenfeld became so frightened by the order of the board that he insisted on the immediate termination of all arrangements with plaintiff. Stella Company reacted to order of the board in the manner expected by the Secretary of the board and Stella company discharged plaintiff immediately and cancelled arrangements for the sale of its shares to him. Plaintiff and Stella Company told she court there were no serious disagreements in existence between Stella Company and plaintiff warranting severance of their relations at that time. The only reason for terminating the relations between the parties was the C.O.D. order of the board. The sudden discontinuance of credit without previous notice placed Stella Company in a position that would make it difficult to carry on its operation in competition with other wholesalers who were enjoying full credit advantages from the board. This was particularly true because the board had exclusive control of named vegetables, the sale of which represented a major portion of the Stella Company business. Stella Company was not only afraid because of the C.O.D. ruling by the board, but was also afraid of what else the board might do if Stella Company did not obey the order and fire plaintiff. I am satisfied that plaintiff has discharged the onus placed on him by law. I find that defendant is responsible for preventing plaintiff and Stella Company from entering into a contract of sale and purchase of shares and for the termination of plaintiff's employment.

18 Plaintiff was working for Stella Company at a salary of $250.00 per week or $13,000.00 per year at the time his employment was terminated. He had just successfully completed arrangements with Stella Company giving him an opportunity to enter into a contract to buy approximately a one-third interest in that firm for an amount not in excess of $50,000.00, and continue to work there as an equal partner with equal pay. Plaintiff was brought up in his father's wholesale fruit and vegetable business from childhood. Although he graduated in engineering, he gave up his job in that profession and came back to manage his father's business when the latter died in 1967, because this was the vocation he knew and loved best. Since September 1974, plaintiff has been doing odd jobs from time to time, making approximately $500.00 a month. As a result of the board's interference, plaintiff lost his $13,000.00 a year job and an opportunity to own approximately a one-third interest in a firm capable of generating an annual not profit in excess or $100,000.00 before income tax deductions and before pay payment of managerial salaries to principal owners.

19 As the hearing progressed and the evidence disclosed more and more acts of vindictiveness

by the board against plaintiff, I found it difficult to believe that this drama was acted out in 1974 in Manitoba and was not from the pages of medieval history. Never in all my sixteen years of public life and eighteen years on the bench have I come across a more flagrant abuse of power. There are many government sanctioned boards in existence now having exclusive jurisdictions to administer many facets of the economic life of our country, and as our life becomes more interdependent we will have even more such boards. These governmental boards are established to administer exclusively the many different economic programs in our society. They are established with noble aims and for noble purposes. This most glaring abuse of power by the board, however, should not be allowed to pass without some assessment of punitive damages against it. In order to demonstrate to plaintiff that his disagreements would not be tolerated, the board maliciously, with vindictiveness and under pretence that such actions were done to discharge the trust it owed the producers, harassed plaintiff until it drove him out of the wholesale fruit and vegetable business. It is difficult to accurately assess the amount of damages plaintiff has and will suffer as a result of this interference by the board. It could be incalculable or it could be limited, depending on his ability to re-establish himself. He has already lost profits and salary he could have received from Stella Company from September 1974. I am satisfied that damages should be substantial, not only to compensate plaintiff for his losses but also to serve as punitive damages for maliciously interfering with plaintiff in his rightful pursuit of a chosen vocation. I, therefore, assess general and punitive damages of $35,000.00, and plaintiff shall have judgment for that amount plus costs.

SOLOMON J.

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