IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gourdine v. McCoy,*
2013 BCSC 739

Date: 20130430
Docket: S127926
Registry: Vancouver

Between:

Michel Gourdine

Plaintiff

And

Ronald McCoy also known as Ron McCoy and Fairway Recognition Inc.

Defendants

And:

Ronald McCoy also known as Ron McCoy and Fairway Recognition Inc.

Plaintiffs by way of Counterclaim

Between:

Michel Gourdine and Mibrella Inc.

Defendants by way of Counterclaim

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Plaintiff:	Appearing on his own behalf
Counsel for the Defendants:	N. Tejani S. Chow, Articled Student
Place and Date of Trial:	Vancouver, B.C. March 5, 6, 2013
Place and Date of Judgment:	Vancouver, B.C. April 30, 2013

[1] The defendant Fairway Recognition Inc. (“Recognition”) custom makes signs and other promotional material for charity and corporate golf tournaments. The plaintiff Michel Gourdine claims damages for breach of an agreement in which he gave up his interest in Recognition, but retained an exclusive right to deal with designated customers. He also claims damages for interference with economic relations.

[2] Prior to February 2011 the plaintiff and the defendant Ronald McCoy were each 50% shareholders in Recognition. Under a "restructure agreement," dated February 1, 2011, the plaintiff surrendered all of his interest in Recognition and was paid $25,000.

[3] Much of Recognition’s work is based on repeat business from customers it has previously supplied. In the restructure agreement, Recognition and Mr. McCoy agreed to be barred for two years from dealing with approximately 500 customers who were designated on what was called the plaintiff’s “lead list.” The relevant provision of the contract read:

> (a) The Company and McCoy represent, warrant and covenant with Gourdine that the Company and McCoy will not for a period of 2 years after the Closing Date;
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> > (i) solicit the charity and golf tournament business of customers or potential customers that are listed on Gourdine's Lead List;
> >
> > (ii) divert or attempt to divert the charity and golf tournament business of customers or potential customers that are listed on Gourdine's Lead List away from Gourdine;
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> regardless of whether the Company or McCoy do same as an individual, firm, association, syndicate, company, corporation, partnership or other business entity and whether or not there are one or more parties in such business entity. In the event that any customer or potential customer that is listed on Gourdine's Lead List should contact the Company or McCoy, they shall refer the customer to Gourdine. In the event that Gourdine ceases to be active in the business of providing such services to charity and golf tournaments prior to the expiration of aforesaid two year period, then the Company and McCoy shall be released from their obligations under this paragraph 5(a);

[4] The plaintiff similarly agreed not to deal with customers designated on a separate list as customers being retained by Recognition. The parties acknowledged

in the restructure agreement that the “lead lists” had no marketable value because there was “no assurance that such customers and leads will generate business.”

[5] Although the plaintiff was given the exclusive right to deal with the customers on his list, he did not have his own shop in which to produce the material they wanted. The restructure agreement therefore allowed him to order products from Recognition at wholesale prices, which he could then resell to his own customers:

> (d) Subject to the normal and reasonable rules applicable to arms-length re-sellers of the Company's products, Gourdine may purchase products manufactured by the Company with pricing for the first two years after the Closing Date to be as set out in the attached Schedule D (which pricing shall be subject to change to reflect changes to the Company's costs). Gourdine must achieve $60,000 of annual purchases in order for the Company to be obligated to provide such pricing and to be obligated to sell product to Gourdine;

[6] The restructure agreement further provided that, subject to the provisions relating to lead lists and the plaintiff’s wholesale purchasing, the plaintiff and the defendants would be free to compete with each other.

[7] Shortly after the restructure agreement was signed, the plaintiff arranged for the incorporation of a new company, Fairway Impressions Inc. (“Impressions”), to purchase goods from the defendants and supply them to his customers. The plaintiff’s friend Brian Haydamack agreed to become the sole director of Impressions and was given control over its bank account. The plaintiff’s only formal status with Impressions was that of an employee, although he was to initially receive all of its operating profit as salary.

[8] Although the restructure agreement barred Recognition from dealing with customers on the plaintiff’s list, the plaintiff subsequently authorized it to deal directly with many of them, provided that bills were sent to Impressions, which could then collect the marked-up price from the customers.

[9] The effect of this arrangement was that many customers continued to deal with Recognition as they had done previously. Customers would contact or be contacted by Recognition’s office manager, Corinne Leroux, who would arrange for

design, production and delivery of the goods ordered. The only change visible to the customers was the name on the final bills they received. Mr. McCoy testified that 60 to 70 per cent of transactions with customers on the plaintiff's list took place without the plaintiff's direct involvement.

[10] The plaintiff said he continued to regard the customers as his own, with Impressions being involved only for billing purposes. However, Mr. McCoy and Ms. Leroux said they regarded Impressions as a "reseller" of Recognition products and the customers as customers of Impressions.

[11] The parties operated on the basis of those arrangements for a year and a half, but by September 2012, communications between the plaintiff and Mr. Haydamack broke down. The conflicting evidence they gave about how and why that happened is not relevant.

[12] On September, 23, 2012, the plaintiff sent Mr. McCoy an email stating that Impressions "is no longer involved in servicing or billing these existing clients." Mr. McCoy was on vacation at the time, but on September 25, Ms. Leroux said she had been able to contact Mr. McCoy and was instructed that, beginning October 1 and until Mr. McCoy's return, Recognition was prepared to bill customers directly. The plaintiff agreed that certain bills could be sent directly, but on October 2, 2012, instructed Recognition to send all future bills to the "Golf Tournament Resources Group."

[13] Mr. Haydamack did not accept the exclusion of Impressions, which by that point was in debt to Recognition for products that had been delivered but not yet paid for. Mr. McCoy testified this debt was approximately $100,000.

[14] On October 22, Mr. Haydamack instructed the defendants to send bills directly to customers and credit payments to Impressions' outstanding account. He also said the plaintiff was no longer employed by Impressions.

[15] Also on October 22, the plaintiff sent an email telling the defendants to "cease and desist all communication, production coordination and printing" for customers on

his list. The defendants ignored that warning and acted on the instructions received from Mr. Haydamack. Mr. McCoy and Ms. Leroux testified that they were concerned with getting payment of the outstanding Impressions account. Mr. McCoy also said he was aware of past financial difficulties experienced by the plaintiff and would not have extended credit to him.

[16] Recognition then billed customers on the plaintiff's list a little more than $38,000 for work that had been completed or was in progress as of October 22. That was about $8,000 above the wholesale price that would otherwise have been billed to Impressions, the difference being the profit the plaintiff would have received. The defendants also admit they subsequently dealt directly with four other customers and billed them a total of about $1,000.

[17] On February 1, 2013, the restructure agreement's two year restriction on dealing with listed customers expired. Ms. Leroux almost immediately began contacting customers to solicit future business, saying the plaintiff was no longer involved and reminding customers that the material they previously received had been produced by Recognition.

[18] In his Notice of Civil Claim, the plaintiff alleges that, by failing to follow the directions he gave them in late September and early October 2012, the defendants were in breach of the restructure agreement and collected money that he was entitled to. He also alleges that the defendants' efforts to solicit business from his clients after February 1, 2013, constituted unlawful interference with economic relations.

[19] On the alleged breach of the restructure agreement, the defendants rely on the doctrines of promissory estoppel and waiver. They say the plaintiff specifically instructed them to act in ways that were not consistent with the restructure agreement and cannot now rely on the strict terms of that agreement.

[20] The restructure agreement, on its plain reading, contemplated the plaintiff operating a separate business in competition with the defendants, dealing with his

own customers to the exclusion of the defendants, but using Recognition as a wholesale supplier if he chose to do so. The subsequent arrangements differed from that in two important respects.

[21] Firstly, other than for a very brief initial period, the plaintiff never purchased products from Recognition as contemplated by the restructure agreement. He effectively assigned his right to do so to Impressions.

[22] The plaintiff appears to regard the interposition of Impressions as merely a formality or convenience that did not affect his exclusive right to claim the customers as his own and to dictate the terms under which Recognition could deal with them. This ignores the fundamental principle that a corporation is a separate legal entity, with its own rights and obligations. The transactions between Impressions and Recognition created a new set of contractual relations between those companies, including Impressions' obligation to pay for products it had ordered.

[23] If Recognition had abruptly ended its dealings with Impressions as the plaintiff instructed it to do, it would likely have had no means of collecting the debt owed to it by Impressions. The plaintiff had no legal liability for it and Impressions had no other income or assets.

[24] The concept of promissory estoppel was summarized by the Supreme Court of Canada in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 SCR 50 at para. 13:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p. 615:
>
>> It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal

> relations created by the contract would be altered as a result of the negotiations.
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> This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, at p. 647. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

[25] If find those requirements have been satisfied in this case. The plaintiff promised the defendants that Impressions would step into his role and assume his obligations. The defendants acted on that to their detriment by providing goods that only Impressions had any legal obligation to pay for. I find that the doctrine of promissory estoppel applies and the plaintiff could not rely on the strict terms of the contract to the prejudice of the defendants.

[26] Secondly, although the restructure agreement prohibited the defendants from soliciting business from customers on the plaintiff's list, the plaintiff subsequently authorized them to do exactly that. In so doing, he waived his right to object, at least in respect of the specific customers he authorized.

[27] Waiver occurs where one party to a contract takes steps that amount to foregoing reliance on a known right or on a known defect in the performance of the other party. In order for waiver to apply, the party waiving must have both a full knowledge of his or her rights and an unequivocal and conscious intention to abandon them. *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.,* [1994] 2 SCR 490 ("*Saskatchewan River Bungalows*") at paras. 19 and 20.

[28] The plaintiff clearly waived the restructure agreement's absolute prohibition on the defendants dealing with his customers. Waiver can be retracted on reasonable notice (*Saskatchewan River Bungalows* at para. 27), but even when he instructed the defendants to stop billing Impressions, the plaintiff did not immediately retract his waiver on dealing with customers. That did not happen until October 22, when it would have prevented the defendants from billing customers for whom work had already been done. That cannot be considered reasonable notice.

[29] At most, the plaintiff's retraction would have been on reasonable notice in respect of the four projects that began after October 22. The evidence is that this

billing amounted to about $1,000, including the defendants' production costs. There is no direct evidence about what the profit payable to either the plaintiff or Impressions would have been, although based on the evidence of other billing it would likely have been in the range of $200.

[30] In any event, even if those customers had been referred to the plaintiff as required by the restructure agreement, there is no evidence that he would have been able to fill their orders at the time without access to the defendants' facilities.

[31] For all of the above reasons, I find that the plaintiff's claim for breach of the restructure agreement cannot succeed because, even if there was a breach of the contract, the plaintiff's right to rely on it is barred by promissory estoppel and waiver.

[32] I also find that the plaintiff has failed to prove his claim of unlawful interference with contractual relations. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (1998), 40 OR (3d) 229 (Gen. Div.) at 244, var'd on other grounds (2000), 46 OR (3d) 760 (CA), aff'd 2001 SCC 59, the court summarized the elements of that tort as follows:

> (1) the existence of a valid business relationship or business expectancy between the plaintiff and another party;
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> (2) knowledge by the defendant of that business relationship or expectancy;
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> (3) intentional interference which induces or causes a termination of the business relationship or expectancy;
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> (4) the interference is by way of unlawful means;
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> (5) the interference by the defendant must be the proximate cause of the termination of the business relationship or expectancy; and
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> (6) there is a resultant loss to the plaintiff.

[33] In *0856464 B.C. Ltd. v. TimberWest Forest Corp.,* 2012 BCSC 597, Fitzpatrick J. thoroughly reviewed the subsequent jurisprudence on the definition of the fourth element-- unlawful means. She concluded that the actions of the defendant which are said to be the "unlawful means" must be directed at a third party, which then becomes the vehicle through which harm is caused to the plaintiff.

That definition adopts the reasoning of the majority in the *House of Lords* in *OBG Ltd. v. Allan*, [2007] UKHL 21, where Lord Hoffman said:

> Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. (emphasis added)

[34] For example, the requirement for unlawful means will be satisfied when the defendant uses threats or intimidation to force a third party to end its business relationship with the plaintiff. It will not be satisfied merely by solicitation of the third party's business in a competitive market.

[35] There is no evidence of the defendants using any unlawful means against the customers. They simply confirmed to the customers that they had done work for them in the past and that they no longer had any association with the plaintiff, all of which was true.

[36] The defendants were also not in breach of any obligation owed directly to the plaintiff. The restructure agreement specifically provided that the plaintiff and the defendants were in competition, subject to agreed upon restrictions on who could contact certain customers during a defined period. It follows that once that period expired, as it did on February 1, 2013, the plaintiff had no further proprietary right to those customers and there was no further restriction on the defendants' right to compete for their business.

[37] In summary, the plaintiff's claim must be dismissed, with costs. The defendants have also advanced a counterclaim which the plaintiff has admitted and which I therefore do not need to comment on.

"N. Smith J."