St. John's Law Review

Volume 20
Number 2 *Volume 20, April 1946, Number 2*

Article 9

Master and Servant--Soliciting Former Employer's Customers (Kleinfeld v. Roburn Agencies, 60 N.Y.S.2d 485 (1st Dep't 1946))

St. John's Law Review

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As stated by the Supreme Court in an earlier decision,[9] the Congressional intent in enacting the legislation was to foster the distribution of employment opportunities among a greater number of individuals by making it costly for employers to work employees beyond 40 hours in any one week. The present decision supports this intent and the firm stand which the courts have taken on overtime practices has been retained. This policy will undoubtedly prove important in the employment picture of the post-reconversion period.

E. M. F.

MASTER AND SERVANT—SOLICITING FORMER EMPLOYER'S CUSTOMERS.—Plaintiff sued to recover percentage of the profits allegedly due him under a contract of employment to manage defendant's department store. He admitted that he was paid a salary but stated that he had not received any of the percentage of the profits due him. Defendant denied plaintiff's claim for a percentage of the profits and set up several counterclaims. In the first counterclaim the defendant asserted that plaintiff had obtained names of defendant's customers during his period of employment and had solicited trade from them in competition with his master for a company in which the plaintiff held a financial interest. This counterclaim stated that by reason of such misconduct, the plaintiff forfeited his right to retain the weekly wages he received for his employment, which wages totalled $10,065. The second counterclaim sought an injunction to prevent plaintiff from using the information which he had obtained in the course of his former employment. Plaintiff made a motion to dismiss defendant's counterclaims as insufficient in law. The Supreme Court, New York County, denied plaintiff's motion to dismiss and he appealed to the Appellate Division, First Department. *Held,* order of Supreme Court modified by striking out the counterclaims. *Kleinfeld v. Roburn Agencies,* — App. Div. —, 60 N. Y. S. (2d) 485 (1st Dep't 1946).

As to the first counterclaim that, because of his misconduct, plaintiff had forfeited the weekly wages he had received, defendant did not assert that there was any special agreement on which he based his claim for recovery of the wages already paid. The mere relationship of master and servant is not enough to constitute the servant as a fiduciary accountable for the wages he has received.[1] In the absence of a special agreement rendering the employee liable for wages received, an employer cannot recover back such wages or equivalent drawings paid during a period of completed employment.[2] It would

[9] Overnight Motor Transportation Co., Inc. v. Missel, 316 U. S. 572, 86 L. ed. 1682 (1942).

[1] American Stay Co. v. Delaney, 211 Mass. 229, 97 N. E. 911 (1912).

[2] Pease Piano Co. v. Taylor, 197 App. Div. 468, 189 N. Y. Supp. 425 (1st Dep't 1921).

seem that defendant might better have alleged damages suffered as a result of plaintiff's breach of contract of employment.

As to the second counterclaim seeking an injunction, there was claim made by defendant that there was an implied negative covenant in the contract of employment, namely, that the plaintiff would not use information obtained in the course of his employment after such employment terminated. However, the covenant implied in a contract of employment is that an employee may not gain knowledge and information of a trade secret, and then turn it to his own advantage against his employer.[3] There is no question of a trade secret involved in the present case. Plaintiff, it is true, obtained names of his employer's customers in the course of his employment. But this was certainly no trade secret. This is no breach of a confidential relationship because no secret was imparted to the plaintiff. The customers were doing business openly at advertised locations. Had these customers been varied individuals who were unadvertised and could be reached only by personal contact, a different question would be presented.[4] Such customers could be obtained only by use of information an employee obtained in the course of his employment. It further appears in the case at hand that plaintiff solicited only those customers who were not only openly doing business at advertised locations, but who were also doing business with competitors of the defendant.

Can it be said that there is anything wrong in an employee trying to better himself? It has long been well settled that in the ordinary agreement of employment, there is no implied contract by the employee not to solicit the customers of his former employer after the termination of employment, and to that extent he may use information obtained in his former position provided there is no breach of confidence.[5] Thus, in order to succeed, the counterclaim must show conduct which exceeds the bounds of permissible competition. There were no facts to evidence unconscionable conduct on the part of the plaintiff. The customers' names were obtainable without resort to any trickery. An employee cannot help acquiring knowledge in the course of his employment, and it would be violative of fundamental rights to hold that he must abandon all that he has learned on taking employment elsewhere.

A. W. K. III.

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[3] Kaumagraph Co. v. Stampagraph Co., 235 N. Y. 1, 138 N. E. 485 (1923).

[4] People's Coat, Apron & Towel Supply Co. v. Light, 171 App. Div. 671, 157 N. Y. Supp. 15 (2d Dep't 1916), *aff'd,* 224 N. Y. 727, 121 N. E. 886 (1918).

[5] Scott & Co., Inc. v. Scott, 186 App. Div. 518, 174 N. Y. Supp. 583 (1st Dep't 1919).