St. John's Law Review

Volume 18, November 1943, Number 1 Article 6

Conspriacy--Actionable Wrong in Maliciously Interfering with Broker's Right to Earn Commission (Kevicsky v. Lorber, 290 N.Y. 297 (1943))

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RECENT DECISIONS

CONSPIRACY—ACTIONABLE WRONG IN MALICIOUSLY INTERFERING WITH BROKER'S RIGHT TO EARN COMMISSION.—The Dry Dock Savings Institution, the owner of certain real property, employed plaintiff to sell the property and agreed to pay plaintiff the usual brokerage commission. For several months the plaintiff negotiated between the defendant, Lorber, and the bank, and induced the bank and Lorber to be satisfied with a price of $480,000, $50,000 cash and a five-year mortgage of three and one-half per cent and a one per cent amortization. In August, 1938, after defendant, Lorber, had told plaintiff he was satisfied with the terms he informed plaintiff that he would not close the deal unless plaintiff would give him $7,200 of the $8,200 commission which plaintiff would earn.[1] Plaintiff refused and informed the bank of the stand he had taken concerning the proposition for the splitting of the brokerage commission by Lorber. Subsequently the bank employed Geller Realty Associates, a dummy broker, who arranged to give Lorber all of the commissions to be earned except $1,200. The sale was consummated on substantially the same terms as plaintiff had arranged and Geller Realty Associates endorsed the commission check from the bank over to Lorber who then paid Geller Realty Associates $1,200. Plaintiff did not claim that he ever did procure a purchaser. He did not sue for commissions as such. Plaintiff alleged that, through a conspiracy which was illegal and fraudulent, he was prevented from procuring a purchaser, and that if the scheme had not been put into operation plaintiff could have procured the purchaser and would have earned his commission. *Held,* judgment for plaintiff affirmed. The damage suffered by plaintiff was the loss of an asset in his business and the acquisition by defendant, Lorber, of that asset. When defendants conspired to refrain from dealing with plaintiff and thus, although accepting the fruits of his labors, prevented him from earning his commission, an actionable wrong arose, giving rise to liability for the damages resulting therefrom to plaintiff which consisted of the amount of the commissions which plaintiff would otherwise have earned. It constituted an unjustifiable interference with the right of plaintiff to pursue his lawful occupation and to receive the earnings of his industry and the fruits of his labors. *Kevicsky v. Lorber,* 290 N. Y. 297, 49 N. E. (2d) 146 (1943).

No branch of the law has been less clear than that of conspiracy. At common law there was an action on the case in the nature of conspiracy for the damage caused to plaintiff.[2] The law of con-

[1] The amendment of Section 442 of the New York Real Property Law, prohibiting splitting of commissions by a broker with a purchaser did not become law until April 25, 1941 (N. Y. Laws 1941, c. 719).

[2] Sorrel v. Smith, [1925] A. C. 700.

spiracy pertaining to brokerage commissions has gradually been extended by the courts of the State of New York. In 1929 the Second Department of the Appellate Division of the Supreme Court held that the interference of a third party in preventing an employer from paying earned commissions to a broker was not an actionable wrong incurring liability to the alleged tortfeasor. Only the contractor was held liable for the amount due on the contract.[3] This type of interference with partial execution of the contract was held not sufficient to support a tort action. This decision was directly at variance with the determination of the First Department in 1928 to the effect that one who, with knowledge of an existing valid contract between others, intentionally, knowingly, and without reasonable justification or excuse, induces breach to the damage of one of the other parties, is liable for damages sustained.[4] In 1930 the Court of Appeals affirmed the decision of the First Department thereby disapproving of the adverse holding of the Second Department. In *Union Car Advertising Company v. Collier,*[5] the court were of the opinion that the plaintiff failed to maintain the burden of proof to show that defendant used such means to procure the contract as would support an action. In *Clinchy v. Grandview Dairy, Inc.,*[6] it was held that an insurance company is obliged to obey the instructions of the insured as to the selection of the broker and that, under these circumstances, the insurance company is without liability to the broker.

As early as 1926 the courts of Connecticut allowed damages to be recovered by plaintiff broker.[7] In 1934 the State of New Jersey held that a conspiracy to deprive a broker of earned commissions constituted an actionable wrong.[8] The federal courts have also indicated that damage may be recovered under like circumstances.[9] An

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[3] Weinberg v. Irwinessie Holding Corp., 225 App. Div. 241, 232 N. Y. Supp. 443 (1929).

[4] Hornstein v. Podwitz, 224 App. Div. 11, 229 N. Y. Supp. 159 (1928), *aff'd,* 254 N. Y. 443, 173 N. E. 674 (1930). Defendant, third party, induced plaintiff's contractor to breach contract.

[5] Union Car Advertising Co. v. Collier, 263 N. Y. 386, 189 N. E. 463 (1934). Defendant induced third party to enter into contract with defendant even though plaintiff's bid was lower than that of defendant.

[6] Clinchy v. Grandview Dairy, Inc., 283 N. Y. 39, 27 N. E. (2d) 425 (1940). After binders were issued, the defendant, Grandview Dairy, Inc., for political reasons, instructed the defendant insurance company that the insurance contract would be entered into only with a broker other than the plaintiff.

[7] Skene v. Carayanis, 103 Conn. 708, 131 Atl. 497 (1926). Broker obtained purchaser for certain real property at $90,000. Purchaser subsequently made a deal through another broker for $85,000. Plaintiff was allowed to recover damages, not commissions.

[8] Kamm v. Flink, 113 N. J. L. 582, 175 Atl. 62 (1934). Defendant, Julius Flink, president of Building and Loan Association, induced plaintiff, broker, to reveal the name of his customer. Defendant then gave the name of plaintiff's client to his brother, Carl Flink, who acted as a broker. Case was dismissed by the trial court as insufficient at law but was reversed by the higher court on the law and remanded for trial.

[9] Lewis v. Bloede, 202 Fed. 7 (1912).

early Michigan case held that where the defendant maliciously and without good cause persuaded a potential buyer to reject the machine of the plaintiff, inventor, the defendant was liable for damages sustained.[10] In the principal case the Court of Appeals affirmed the determination reached in *Hornstein v. Podwitz*,[11] to the effect that all parties wrongfully inducing a breach of contract to pay a broker commissions are jointly and severally liable. However, the court by basing the decision on the conspiracy to prevent the plaintiff from earning commissions rather than upon the theory of interference with the payment of commissions already accrued, extended the law to include cases wherein the contractual relationship has not yet matured.

J. L. S.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND PRESS—DISTRIBUTION OF LITERATURE.—The appellant, espousing the creed of Jehovah's Witnesses, knocked on doors and rang doorbells in the defendant city for the purpose of distributing leaflets advertising a religious meeting. For delivering a leaflet, she was convicted in the Mayor's Court and fined on a charge of violating a city ordinance.[1] On appeal from conviction, appellant claimed the ordinance was in violation of the right of freedom of press and religion under the Federal Constitution.[2] The Supreme Court of Ohio affirmed the conviction,[3] whereupon appellant appealed to the United States Supreme Court. *Held*, reversed. The ordinance is unconstitutional because it abridges the freedom of speech and press as guaranteed by the First and Fourteenth Amendments of the United States Constitution.[4] *Martin v. City of Struthers, Ohio*, 317 U. S. 589, 63 Sup. Ct. 42, 87 L. ed. 22 (1943).

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[10] Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869 (1895).

[11] 224 App. Div. 11, 229 N. Y. Supp. 159 (1928), *aff'd*, 254 N. Y. 443, 173 N. E. 674 (1930).

[1] The ordinance reads as follows: "It is unlawful for any person distributing handbills, circulars or other advertisements, to ring the doorbell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any other person with them may be distributing."

[2] U. S. CONST. AMEND. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press."

U. S. CONST. AMEND. XIV. Second sentence reads, in part: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."

[3] 139 Ohio St. 372, 40 N. E. (2d) 154.

[4] See note 2 *supra*.

But see dissenting opinion of Mr. Justice Reed: "No ideas are being suppressed. No censorship is involved. The freedom to teach or preach by word or book is unabridged, save only the right to call a householder to the door of his house to receive the summoner's message. I cannot expand this regulation to a violation of the First Amendment." Martin v. Struthers, 317 U. S. 589, 63 Sup. Ct. 42, 87 L. ed. 22 (1943).