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# Labor Unions--Collective Bargaining Agreement--Injunction--Section 876-a C.P.A. (Nevins, Inc. v. Kasmach, 279 N.Y. 323 (1938))

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to the limitation, however, that it may not be arbitrary, unreasonable, or capricious.[24] In this case its power has clearly been transcended.

R. B. G.
S. C. S.

LABOR UNIONS—COLLECTIVE BARGAINING AGREEMENT—INJUNCTION—SECTION 876-A C. P. A.—The plaintiff-employer and defendant-union entered into a collective bargaining agreement for one year, under the terms of which it was agreed that during its existence "there should be no strike or lockout." The union called a strike in alleged violation of the agreement. The employer then brought suit for an injunction, alleging a breach of the contract; he also alleged facts sufficient to state a cause of action under Section 876-a of the New York Civil Practice Act.[1] The Appellate Division dismissed the complaint, reversing the decision of the Special Term which granted the injunction, on the ground that the contract was unenforceable in equity as it was against the legislative policy of this state.[2] On appeal, *held,* reversed, "The complaint contains all the allegations required by Section 876-a of the Civil Practice Act pre-

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[24] Instant case. § 10 of the ACT, 49 STAT. 453, 29 U. S. C. A. § 160 (Supp. 1935).

[1] N. Y. CIV. PRAC. ACT § 876-a: "Injunctions issued in labor disputes. 1. No court nor any judge * * * shall have jurisdiction to issue any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute, as hereinafter defined, except after a *hearing,* and *except after findings of all the following facts by the court* * * * : (a) That unlawful acts have, or a breach of any contract [collective bargaining] not contrary to public policy, has been threatened or committed and that such acts or *breach* will be executed or continued unless restrained; (b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted; (c) * * * [that compainants will suffer more than the defendant by denial of the injunction]; (d) That complainant has no adequate remedy at law; (e) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection; * * *." (Italics ours.)

Aberdeen Restaurant Corp., 158 Misc. 785, 285 N. Y. Supp. 832 (1935) (holding that "this section is constitutional since there is no deprivation of a right, but only a limitation of circumstance under which an injunction will be issued").

For a discussion of the court's construction of the term "labor dispute" as used in this section see (1938) 12 ST. JOHN'S L. REV. 358.

For a general discussion of the Norris-La Guardia Act upon which § 876-a is based, see (1938) 13 ST. JOHN'S L. REV. 171; Tapley, *The Anti-Union Contracts* (1936) 11 ST. JOHN'S L. REV. 40; for discussion of § 876-a see PRASHKER, CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE (2d ed. 1937) 1062-64.

[2] Nevins, Inc. v. Kasmach, 252 App. Div. 890 (2d Dept. 1937).

requisite to the granting of equitable relief." [3] *Nevins, Inc.* v. *Kasmach,* 279 N. Y. 323, 18 N. E. (2d) 294 (1938).

Although the legal status of collective bargaining agreements has been in doubt since their inception, the tendency in recent years has been to enforce specifically these contracts as between the labor union and the employer.[4] However, courts of equity will not grant a decree which will have the effect of forcing work upon an employee.[5] And the New York courts have specifically enforced, by injunctive relief, contracts entered into between labor unions and the employers settling their disputes and prohibiting strikes or lockouts during the term of the said contract.[6] The courts have in the same suit allowed incidental damages to the union or the employer.[7] In 1935 the New York Legislature passed Section 876-a of the New York Civil Practice Act declaring that injunctive relief in a "labor dispute" will be granted *only* when all of the requirements of that section are met.[8] From

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[3] Instant case at 325, 18 N. E .(2d) at 295. It should be noted that on the first appeal, Nevins, Inc. v. Kasmach, 278 N. Y. 705, 16 N. E. (2d) 852 (1938), the court denied the motion to dismiss on the ground that the same did not merely involve academic and moot questions.

[4] "Trade agreements are compacts as to wages, hours, recognition of the union, and general conditions of employment which are made between an employer or an association of employers and organized labor." PATTERSON, SOCIAL ASPECT OF INDUSTRY (1935) 431, cited in Tanque III, *Development of Industrial Conciliation and Arbitration Under Trade Agreements* (1938) 17 ORE. L. REV. 263; Rice, *Collective Labor Agreements in American Law* (1931) 44 HARV. L. REV. 572; Cole, *The Civil Suability at Law, of Labor Unions* (1939) 8 FORDHAM L. REV. 29; Tapley, *loc. cit. supra* note 1; Comment (1932) 41 YALE L. J. 1221.

[5] WALSH, EQUITY (1930) § 66.

[6] Jacobs v. Cohen, 183 N. Y. 207, 210, 76 N. E. 5, 7 (1905) (holding that "a contract made by an employer of labor, by which he binds himself to employ and retain in his employ only members in good standing of a single labor union, [is] consonant with public policy, and enforceable in the courts of justice in this state"); Schlesinger v. Quinto, 201 App. Div. 487, 194 N. Y. Supp. 401 (1st Dept. 1921); Goldman v. Cohen, 222 App. Div. 631, 227 N. Y. Supp. 311 (1st Dept. 1928); Segenfield v. Friedman, 117 Misc. 731, 193 N. Y. Supp. 128 (1922) (holding that a labor union is a legal entity and suable under the New York General Association Law); Ribner v. Rasco Butter & Egg Co., 135 Misc. 616, 619, 238 N. Y. Supp. 132, 138 (1929) (holding that there is "mutuality of obligation and mutuality of remedy"); Sullen v. Unity Button Works, Inc., 144 Misc. 784, 258 N. Y. Supp. 622 (1935); DeAgostina v. Parkshire Ridge Amusements, 155 Misc. 518, 520, 278 N. Y. Supp. 622, 624 (1935) (holding that "Closed shop agreements do not contravene public policy and are specifically enforceable in equity"). But *cf. In re* Buffalo, 250 N. Y. 275, 165 N. E. 291 (1929); see Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 530 (1927); (1938) 13 ST. JOHN'S L. REV. 166.

For the attitude of the courts prior to Schlesinger v. Quinto, *supra,* see Stone Cleaning v. Russell, 38 Misc. 513, 74 N. Y. Supp. 1049 (1902) (holding that no injunction will issue); to the same effect see Barzlay v. Loewenthal, 134 App. Div. 502, 119 N. Y. Supp. 612 (1st Dept. 1909).

[7] *Ibid.;* DeAgostina v. Parkshire Ridge Amusements, 155 Misc. 518, 278 N. Y. Supp. 622 (1935) (holding that a union may recover as part of its damages loss of wages to its employees, its members, who were forced to go on strike).

[8] See note 1, *supra.*

a close consideration of the prerequisites required by the Legislature it appears that no injunction will issue unless the striking and/or picketing is unlawful.[9] Consequently, the Appellate Division, apparently construing the contract in the instant case as preventing *all* strikes, held it void as against the public policy of this state as expressed in Section 876-a.[10] It appears that the *ratio decidendi* of the Appellate Division was that a contract not to strike was unenforceable in a court of equity.[11] The contract referred to in subdivision "a" of Section 876-a is by the terms of the statute one not contrary to public policy. And, inasmuch as the right to strike cannot be waived by the parties, the holding appears to be correct.[12] If it be true that the "strike clause" in the agreement is unenforceable and keeping in mind that such provision is a substantial part of the consideration promised by the union, it is difficult to see how an agreement, wherein such a clause appears, will be enforced.[13] The argument is made that 876-a makes such a clause void (unenforceable), but it is submitted that 876-a merely regulates procedure and was not intended to affect the substantive rights of the parties. The question then arises, of what value is such a contract? Surely, the giving up of a right to strike for a definite period as consideration for which the employer agrees to recognize the union, pay higher wages, etc., is not against public policy.[14] It is further submitted that the breach of a collective bargaining agreement, which in no way contravenes the statute satisfies one of the prerequisites for the issuance of an injunction, to wit, subdivision "a" of 876-a of the Civil Practice Act.[15]

A further question remains: Will an action lie at law for a

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[9] *Ibid.;* also consider N. Y. CIV. PRAC. ACT § 876-a, subd. 1(f).

[10] Nevins, Inc. v. Kasmach, 252 App. Div. 890 (2d Dept. 1937); see notes 1, *supra,* and 12, *infra.*

[11] *Ibid.*

[12] *Ibid.;* the Special Term stated that an injunction would issue "as an ordinary action in equity for a breach of the collective bargaining contract between the plaintiff [employer] and defendant [union] because there was at the time of the calling of the said strike, no 'labor dispute' [as defined in subdivision 10(c) of Section 876-a of Civil Practice Act] existing between the plaintiff and defendant and there is none up to the time of this decision."

It would seem from an examination of subdivision 10(c) that the term "labor dispute" as used in this statute is sufficiently broad to cover all breaches of collective bargaining agreements. Further, assuming such a breach is a "labor dispute" it would appear from a reading of Section 876-a, subdivision 1, that a compliance with all the requirements of this section are necessary to bring the case within the purview of the statute. See note 1, *supra.*

"Congress * * * recognized the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands." National Labor Relations Board v. Fansteel Metallurgical Corp., 59 Sup. Ct. 490 (1939); see (1939) 13 ST. JOHN'S L. REV. 395.

[13] WHITNEY, CONTRACTS (2d ed. 1934) §§ 93, 94.

[14] See notes 4 and 6, *supra.*

[15] See note 1, *supra.* "As the law stands it is still possible to obtain an injunction after a hearing when violence, fraud, and breach of lawful contract is shown." Aberdeen Restaurant Corp., 158 Misc. 785, 788, 285 N. Y. Supp. 832, 833 (1932).

breach of a collective bargaining agreement? To date there have been no adjudications on this point.[16] This anomalous situation may be explained, undoubtedly, in that equity offers the more adequate relief.[17] In the case of *Gulla* v. *Barton*, the court by way of *dictum* said: "The agreement [collective bargaining] referred to was a valid contract, which may be enforced in any proper manner." [18]

The decision of the Court of Appeals in the instant case, unfortunately, did not pass upon the validity of such an agreement, *i.e.*, a collective bargaining agreement containing a "strike clause".[19] By holding that the complaint stated a good cause of action, it might be inferred that the contract was not contrary to public policy and, therefore, the breach thereof would satisfy subdivision "a" of Section 876-a of the Civil Practice Act.

B. B.

LIBEL—STATUTE OF LIMITATIONS—EFFECT OF "REPUBLICATION".—Plaintiff alleged that he was libeled by defendant in its publication of December 16, 1935. It was further alleged that defendant "republished" the libel in March, 1937 by allowing a third party to read copies of the newspaper kept on file in its offices. The present action was commenced on May 7, 1937, more than one year after the first publication but within the statutory period after the alleged "republication". *Held,* two judges dissenting, action barred by Stat-

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[16] Rice, *op. cit. supra* note 4, at 604.

[17] See note 6, *supra;* see also Comment (1932) 41 YALE L. J. 1221.

[18] 164 App. Div. 293, 295, 149 N. Y. Supp. 952, 953 (3d Dept. 1914); Keysaw v. Dotterweich, 121 App. Div. 58, 59, 105 N. Y. Supp. 562 (4th Dept. 1907); Stone Cleaning v. Russell, 38 Misc. 513, 515, 516, 77 N. Y. Supp. 1049, 1050 (1902), holding that the "plaintiff, if it has any cause of action, will have an adequate remedy at law, just as would any other employee wrongfully discharged. It will be possible for it [the union] to show the amount of services of the time specified in the contract rendered to the defendant by others than its members, and which its members might have rendered, and the consequent damages, if *any*." (Italics ours.)

This case also determines the rights of the individual employees, who are union members by virtue of a collective bargaining agreement. Such employees will be permitted to sue in their own names under the beneficiary contract theory, thereby repudiating the "agency" and "usage" theories. But *cf.* Langmade v. Olean Brewing Co., 137 App. Div. 355, 121 N. Y. Supp. 388 (4th Dept. 1910), which accepted the "usage" theory by way of *dicta.* For a very able study of this problem see Rice, *loc. cit. supra* note 4; see O'Keefe v. United Ass'n of Plumbers, 277 N. Y. 300, 14 N. E. (2d) 77 (1937). See WHITNEY, *op. cit. supra* note 13, at 118 *et seq.* for discussion of beneficiary contracts.

Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905), holding that an action will lie against an employer by a union on a note given as security "to be applied as liquidated damages", if the collective bargaining agreement is violated by the employer.

[19] Instant case at 325, 18 N. E. (2d) at 295.