

94-LW-5155 (10th)

Robert L. James, Plaintiff-Appellant

v.

Big Bear Stores Company et al., Defendant-Appellee

No. 93AP-325.

10th District Court of Appeals of Ohio, Franklin County.

Decided on January 27, 1994.

APPEAL from the Franklin County Court of Common Pleas.

Wayne E. Link, for appellant.

Lane, Alton & Horst, John M. Alton and Lorna H. Overly, for appellee Big Bear Stores.

Vorys, Sater, Seymour & Pease, and Randall Mikes, for appellee ADT Security Systems, Inc.

OPINION

DESHLER, J.

Appellant, Robert L. James, appeals from a decision of the Franklin County Court of Common Pleas granting summary judgment for appellee Big Bear Stores Company ("Big Bear") on appellant's claim for intentional interference with his employment contract with his then employer, appellee ADT Security Systems, Inc. ("ADT").

Prior to August 1989, appellant operated a business which sold, installed, and monitored theft and fire alarm systems under the name Security Plus. Beginning approximately in December 1988, appellant began to install, service, and monitor alarm systems at five Big Bear stores and one Big Bear warehouse. Appellant's company was engaged to perform this work by Jerry Pletcher, Big Bear's Corporate Director of Lost Prevention, who was familiar with appellant's prior work and experience with Big Bear's "Radionics" security system because appellant had performed subcontract work for a prior Big Bear security systems supplier which had gone out of business. Appellant's company provided alarm system services for Big Bear through July 1989, at which time business relations were severed in a dispute over rates.

On August 22, 1989, appellant became employed by ADT, which was also a Big Bear security vendor. Although ADT had numerous other commercial customers, appellant was assigned to work on Big Bear security systems because of his unique knowledge and skill with Radionics alarm equipment.

In November 1990, appellant sued Big Bear seeking payment for work performed prior to August 1989 by his own company, Security Plus.

Upon learning of appellant's suit against Big Bear, Jerry Pletcher contacted Bob Walter, national accounts manager for ADT, to request that appellant not be assigned to further work on Big Bear premises. On November 20, 1990, Mr. Walter notified local Columbus ADT managers that "Mr. Pletcher feels it is in the best interests of both of our companies not to have [appellant] work on systems at Big Bear locations if he feels this way towards that company, in terms of what he may or may not do in regard to installations and/or discussing his claims with Big Bear employees."

Some nine months later, appellant was informed that his employment was being terminated by ADT. The memo notifying him of this stated in part:

"Your position is being eliminated because we have only one major client who requires a Radionics technician. As you are aware, that client has specifically requested you not service their equipment or visit their sites. The total amount of installation and service work on Radionics equipment we are asked to perform does not justify retaining a Radionics technician."

Appellant then brought suit against Big Bear Stores alleging breach of contract, intentional interference with employment contract, and defamation. Appellant also brought suit against ADT, alleging breach of employment contract, intentional infliction of emotional distress, and unpaid overtime compensation under the Fair Labor Standard Act. In a decision rendered on January 25, 1993, the trial court granted Big Bear's motion for summary judgment on the issues of intentional interference with employment contract, intentional infliction of emotional distress, and defamation, while denying summary judgment on the breach of contract claim against Big Bear. In the same decision, the trial court granted summary judgment for ADT on appellant's claims for breach of employment contract and intentional infliction of emotional distress, as well as partial summary judgment on the overtime compensation claim.

Appellant has timely appealed and brings forth the following two assignments of error:

"1. The trial court erred by granting summary judgment in favor of the Defendant, Big Bear Stores Company, by stating that after construing the facts most strongly in favor of the Plaintiff, no genuine issue of fact exists, and as a matter of law, Big Bear Stores Company was privileged to procure the termination of the Plaintiff from his employment with ADT Security Systems.

"2. The trial court erred by granting summary judgment in favor of the Defendants, ADT Security Systems; by stating that after construing the facts most strongly in favor of the Plaintiff, no genuine issue of fact exists, and as a matter of law, ADT Security Systems is not liable to the Plaintiff for discharging him from his employment."

Assignment of error number two, relating to appellee ADT, need not be discussed in this decision as this court entered judgment on July 1, 1993 dismissing all issues between appellant and ADT pursuant to App.R. 28.

The sole issue remaining in this appeal, pursuant to appellant's first assignment of error, is whether the trial court erred in concluding that there existed no issue of material fact which would negate Big Bear's claim of privilege in communicating to ADT that it preferred not to have appellant working on its premises. It is fundamental that upon a motion for summary judgment, Civ.R. 56 requires that a trial court examine the evidence in a light most favorable to the nonmoving party; summary judgment should be granted only if no genuine issue of fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come but one conclusion, which is adverse to the nonmoving party. Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64. A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which the party bears the burden of production at trial. Wing v. Anchor-Media, LTD. of Texas (1991), 59 Ohio St.3d 108, paragraph three of the syllabus.

The tort of tortious interference with contractual relations has been defined as follows in Ohio:

"The basic principal of a 'tortious interference' action is that one, who is without privilege, induces or purposely causes a third party to discontinue a business relationship with another is liable to the other for the harm caused thereby." Wolf v. McCullough-Hyde Memorial Hosp. (1990), 67 Ohio App.3d 349, 355 (citing Juhasz v. Quick Shops, Inc. (1977), 55 Ohio App.2d 51).

The elements of the tort are:

"(1) a business relationship; (2) the wrongdoers knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom." Id.

The rule in Ohio is that an employee has a right to pursue his employment free from unwarranted interference by third persons, and that an actor who maliciously or wantonly secures the dismissal of such employee is liable to the employee in an action for tortious interference with business relationship. Contadino v. Tillow (1990), 68 Ohio App.3d 463, 467. This is the case even in instances of at-will employment. Id.; Smith v. Klein (1985), 23 Ohio App.3d 146.

This court has previously held, however, that such freedom from interference is not unlimited:

"*** [O]ne is privileged to purposely cause another not to perform a contract with a third person where he in good faith is asserting a legally protected interest of his own, which he believes will be impaired or

destroyed by the performance of the contract. *** It would then seem necessary to balance all of the interests, social, economic and private of the objectives as advanced in defense of the interference as against the importance of the interest interfered with, considering all of the facts and circumstances of the matter, including the method and means used and the relationship of the parties." Pearse v. McDonald's (1975), 47 Ohio App.2d 20, 25.

The court in Juhasz, restated this test for the existence of privilege in a more explicit fashion, stating that the finder of fact must consider: "(a) the nature of the actor's conduct; (b) the nature of the expectancy with which his conduct interferes; (c) the relation between the parties; (d) the interest sought to be advanced by the actor; and (e) the social interest in protecting the expectancy on the one hand and the actor's freedom of action on the other hand." Juhasz, supra, paragraph three of the syllabus (based in part upon 4 Restatement of Torts 2d Section 767).

In the case before us, the trial court concluded 'that there remained no issue of material fact on the question of whether Big Bear was' privileged to convey to ADT its desire not to have appellant work on Big Bear premises. Examining the record in light of the five indicia of privilege set forth in Juhasz, we conclude that the trial court did not err in granting summary judgment in favor of Big Bear on appellant's claim for tortious interference with his employment contract.

Examining first the nature of Big Bear's conduct in requesting that appellant no longer service its alarm systems, the record contains only evidence that Big Bear's communication with ADT was carefully measured, and did not exceed the scope of privilege granted by Big Bear's ongoing relationship with ADT. Big Bear conveyed only its wishes that appellant no longer perform work on Big Bear premises. And the internal ADT memoranda found in the record contains no indication that Big Bear attempted at any time to secure appellant's discharge from ADT, but merely requested that ADT choose different employees when performing work on Big Bear premises. Although appellant's deposition testimony and affidavit set forth the existence of some ill-will between Big Bear's director of security and appellant, the documentary evidence in the record does not establish that such personal animosity was ever reflected in communications between Big Bear and ADT. In fact, the conflict between appellant and Pletcher was apparent sometime before appellant brought suit against Big Bear to collect money allegedly due on past invoices; yet only then did Big Bear, prompted by the parties' adversarial position in litigation, communicate its misgivings to ADT about appellant's presence on Big Bear premises.

The second factor to be considered under the test in Juhasz, is the nature of the expectancy which was interfered with. In this case, appellant's expectancy was undeniably important, being the employment by which he secured his livelihood. Such an expectancy, however, must be tempered in light of the at-will nature of appellant's employment, which was necessarily predicated on appellant's acceptability to ADT's clients both with regard to technical competence and his personal relationship with those clients.

The third factor to be considered is the relationship between the parties. It is of singular importance here that ADT and Big Bear were parties to a longstanding and ongoing business relationship. ADT was charged with the service and monitoring of security equipment representing a critically sensitive component of Big Bear's business. The effectiveness of ADT as a security vendor hinged in large part on its ability to retain the confidence of Big Bear's security personnel; conversely, Big Bear could only expect ADT to function responsively if Big Bear clearly communicated its legitimate security concerns. The relationship between Big Bear and ADT was one, then, which called for communications of the type which were engaged in by Big Bear in this case.

Finally, the interests sought to be protected by Big Bear is clearly one which would give rise to privilege, particularly when the societal benefits are weighed. Big Bear's interest in maintaining the integrity of its security systems at its various stores, upon which Big Bear was ultimately dependant for the protection of its inventory and therefore its ongoing business, must weigh heavily. In contrast, appellant's interest under the facts of this case was not in his right to work for ADT under any and all circumstances, but rather his right to work for ADT on Big Bear premises. This is the only impingement upon appellant's employment which resulted from Big Bear's request to ADT. Although appellant ultimately lost his position with ADT due to the lack of other Radionic-based security systems to service, this was not on the record an intentional (although, perhaps, foreseeable) result of Big Bear's communication with ADT regarding-appellant. It is clear, however, that Big Bear did not request that appellant be terminated. If we are to balance the various factors set forth under Pierce and Juhasz, it is apparent that Big Bear was clearly privileged in requesting that ADT not employ appellant for Big Bear's work.

Lastly, we address an argument raised by appellant under the heading of his first assignment of error but without

obvious relation thereto. Appellant argues that his constitutional right of access to the courts was infringed upon when Big Bear sought to bar him from its premises after appellant filed his initial action to recover money for his prior work for Big Bear on his own account. In support, appellant cites the case of Angle v. Chicago, St. Paul, Minneapolis an Omaha Ry. (1983), 151 U.S. 1.

Initially, we note that this argument fails to raise an issue of material fact with regard to the evidence upon which the trial court based its decision. Nor is there raised any question that appellees were not entitled to judgment as a matter of law. The case cited involves an instance in which a wrongfully procured act of a state legislature was invoked in order to bar recovery through the courts. The lack of factual similarity would render that case less than helpful in addressing the one before us. In addition, appellant's present position as a litigant in both this court and the court of common pleas on remaining issues would seem to fatally undermine his assertion that the trial court's grant of summary judgment on certain issues has in some way brought to fruition an effort by Big Bear to deny him access to the courts. Any constitutional due process issues raised by appellant are, therefore, premature at best.

For the reasons set forth above, we find appellant's first assignment of error to be without merit. Appellant's first assignment of error being without merit, and appellant's second assignment of error being mooted by the dismissal of all appellate issues with regard to ADT, the decision of the trial court granting summary judgment in favor of appellees is affirmed.

Judgment affirmed.

TYACK and STRAUSBAUGH, JJ., concur.

STRAUSBAUGH, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.