IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

RICHARD PAULHAMAUS, :
Plaintiff :
:
v. : No. 97-01,962
:
WEIS MARKETS, INC., :
Defendant :

OPINION AND ORDER

Defendant Weis Markets has requested this court to enter summary judgment against Plaintiff Richard Paulhamus, who is suing the company for interference with a contract. Weis Markets argues that summary judgment is appropriate because Pennsylvania does not recognize the particular form of this tort that applies to the action: Intentional Interference with Another's Performance of his own Contract, as set forth in Restatement (Second) of Torts, § 766B. Weis Markets also contends that Mr. Paulhamus has not gathered sufficient evidence to establish the elements that comprise this tort.

After careful consideration of the issues presented we hold that the Pennsylvania Supreme Court would recognize § 766A because it serves the same purpose as §766, Intentional Interference with Performance of Contract by a Third Person, a tort that Pennsylvania recognizes. Both causes of action protect contracting parties from improper interference by outsiders–a function that contract law cannot perform because it deals only with the contracting parties. The improper interference tort, in both its forms, therefore promotes a valuable goal because it encourages and protects the commercial transactions that are so essential to our economy. We also hold that the plaintiff has presented sufficient evidence to permit a jury to find that Weis Markets committed the tort.

Factual Background

In considering this motion for summary judgment the court must view the facts in the light most favorable to the non-moving party. Pennsylvania State University v. County of Centre, 532 Pa. 142, 615 A.2d 303 (1992). These facts are as follows.

Mr. Paulhamus was hired by Weis Markets in 1966 and worked for the company for the next 31 years. On 10 April 1997 he submitted a letter of resignation stating he was resigning effective 25 April 1997 because of unfair working conditions. At the time of his resignation he did not have any prospects of other employment and had not applied for any other jobs.

On or about 18 May 1997 Mr. Paulhamus learned of a possible employment opportunity with Coca-Cola as Bulk Sales Area Manager. He applied for the job, was hired, and began working for Coca-Cola on 16 June 1997. One of his primary responsibilities, as stated in his job description, was "to service and manage all sales functions of the area designated." Weis Markets was one of the stores included in this service area.

On or about 18 June 1997 Weis Markets' Director of Employee Relations Allan Corcoran told Mr. Paulhamus he would not be permitted to service Weis Markets' accounts because of a company policy in the Weis Markets employee handbook stating:

> It is the policy of Weis Markets, Inc. that if anyone leaves our employment to take a position with a supplier, broker, distributor or in any other capacity where that individual could have direct association with our company, we will not deal with that individual as a representative of that supplier, broker, etc. in any matters that relate to our account(s).

On that same date Mr. Corcoran wrote a letter to Mr. Paulhamus quoting the policy, requesting him to "not service our account," and stating, "If you remain with Coke, please

do not go into any of our stores as their representative." On or about 9 June 1997 Mr. Paulhamus told Weis Vice President Ed Rakowski that he had not left his employment with Weis Markets to take the position with Coca Cola and that he would lose his job if Weis refused to allow him to service its accounts. Mr. Rakowski stated he didn't care, and Weis was sticking to its policy. On 19 June 1997 Mr. Paulhamus wrote a letter to Mr. Corcoran stating he did not violate the Weis policy because he did not leave the company to work for Coca Cola and he did not even know about the Coca Cola position until one month after resigning.

Some time within the first two weeks after Mr. Paulhamus began his employment with Coca Cola, Weis' Head Buyer for sodas, Brian Nichols, telephoned Coca Cola Plant Manager John Engel and told him that Weis had a policy forbidding Mr. Paulhamus from servicing Weis accounts and that Mr. Paulhamus was in violation of that policy. On 3 July 1997 Mr. Paulhamus was terminated by Coca Cola because servicing the Weis account was an essential part of his job.

At a subsequent meeting between Mr. Engel, Mr. Corcoran, and Ed Rakowski, the two Weis officials told Mr. Engel that Mr. Paulhamus had violated the company policy and that they strictly enforced the policy for all former Weis employees, regardless of how much time had passed between leaving Weis and obtaining new employment. Mr. Engel told the two men he knew of two former Weis employees who now work for Pepsi, yet Weis permits them to service Weis accounts.

Discussion

A motion for summary judgment may be granted pursuant to Pa.R.C.P. 1035 et seq. when there is no dispute as to any material fact or when, after discovery has been completed, the plaintiff has insufficient evidence to establish the elements of the action. In such instances there is no need for a trial because no reasonable jury could find in favor of the plaintiff. In considering a motion for summary judgment the court must view the record in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the non-moving party. County of Centre, supra.

I. Recognition of § 766A

Pennsylvania has recognized causes of action under Restatement (Second) of Torts, § 766, Intentional Interference with Performance of Contract by Third Person. However, Pennsylvania has never officially adopted § 766A, Intentional Interference with Another's Performance of his own Contract. The case before the court clearly falls under § 766A. Therefore, the threshold question is whether Pennsylvania would recognize § 766A. After considering the policies behind each of the torts, the court sees no reason why Pennsylvania would not adopt § 766A.

A close examination of the language of these two causes of action reveals that they differ only in the type of interference they prevent. Section 766 states:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss

Section 766A states:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

These two torts are extremely close in the policies and purposes they promote. They begin with the basic principle contract law, that a party has a legally protected interest in obtaining the performance of an existing contract, and they expand that right by permitting it to be good against a person who is not a party to the contract. In allowing an aggrieved party to recover damages for contract breaches caused by a non-contracting party, the torts fill in a hole that otherwise exists in our legal system. Because contract law focuses entirely on the contract, it allows an action only against the other contracting party. The propriety of the breaching party's conduct is largely irrelevant; the only consideration is whether the contract was breached. Tort law, however, focuses on *conduct*. The genius of the interference tort is that it permits one to recover from a breach of contract based on *improper conduct* of an outside party, rather than confining itself to examining the contract and the technicalities of the breach.

The modern formulation of the interference tort was developed by Oliver Wendel Holmes, Jr. and Sir Frederick Pollock, both of whom developed the general theory of tort, which is centered around a defendant's conduct.[1] Under this theory, each person has a general duty to abstain from willfully harming another. The essential principle of the general tort law developed by both men and currently accepted in our legal system is that any

---

[1] See Mark P. Gergen, *Tortious Interference: How it is Engulfing Commercial Law, Why this is not Entirely Bad, and a Prudential Response,* 38 ARIZ. L. REV. 1175 *(1996).*

intentional infliction of harm upon another is tortious unless the act can be justified. Both men endorsed the interference tort, which naturally flows from the theory because it focuses on the impropriety of the interference.

Legal scholars have proposed a variety of justifications for the tort.[2] Richard Epstein argues that it is akin to torts that protect property rights from takings, such as conversion and trespass to goods.[3] William Landes and Richard Posner argue that it is analogous to the theory of joint tortfeasors, and that it is economically efficient because it allows the aggrieved party to recover when the other contracting party might be insolvent or when no cause of action could be brought under the contract.[4] Lillian BeView argues that the tort is valuable because contract remedies often under-protect contract rights.[5]

When examined in light of these policies behind extending liability to interference in contractual relations, it becomes clear that § 766 and § 766A are cut from the same cloth, for they both protect a party's interest in receiving performance of an existing contract by allowing the aggrieved party to sue an outsider to the contract who is responsible for the breach. These two sections should therefore properly be viewed as *two types of the same tort.*

This view is supported by the historical development of the intentional interference

---

[2] See id.

[3] Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1 (1987).

[4] WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 222-225 (1987).

[5] Lillian R. BeView, *Reconsidering Inducement*, 76 VA. L. REV. 877 (1990).

tort.[6] First to appear was the tort of interference with prospective contractual relations–specifically, preventing contractual dealings by violence, fraud, or defamation. Liability was later extended for inducing a party to break an existing contract with the plaintiff, even though the means used was not otherwise tortious. Later, liability was further extended for preventing a party from performing a contract with the plaintiff through means other than influencing his mental choice, such as when an intruder destroys the goods to be delivered to the plaintiff. The form of the tort stated in 766A is similar to this last development; it differs only in that it prevents the *injured party* from performing. The Restatement states, "No single case has been identified as constituting the origin of the tort, but it is now consistently recognized." § 766A comment b.

The Restatement itself views § 766, § 766A, and § 766B (Interference with Prospective Contractual Relations) as three forms of one tort, and refers to them as such. Section 767 comment a states:

> The tort of interference with existing or prospective contractual relations includes interference with an existing contract either by causing a third party not to perform his contract with the plaintiff (as in § 766) or by preventing the plaintiff from performing his own contract or making that performance more expensive or burdensome (as in § 766A); it also includes interference with prospective contractual relationships (as in § 766B).

Moreover, the factors to be used in determining whether interference is improper, listed in § 767, apply to all forms of the tort, although the weight carried by the factors may vary considerably depending upon which type is at issue. And finally, the discussions under § 766, § 766A, and § 766B frequently cross-reference the other sections, which demonstrate

---

[6] See Restatement (Second) of Torts, § 766 comment b; § 766A comment b; § 766B comment b.

the close relation between all of these sections.

This short history and the text of the Restatement itself reveal that the various forms of the interference tort developed in a continuum, as an evolving system of protecting contractual interests by prohibiting improper conduct of intruders. Obviously, they are extremely closely linked to one another, and this court sees no reason to sever and isolate § 766A from the other two. Indeed, we see § 766A as a logical extension of § 766, and just as important to our system of contracting. This conclusion is supported by comment c of § 766A, entitled "Rationale," which states:

> Under §766, the plaintiff's interest in obtaining performance of the contract is interfered with directly. Under this Section [766A] the interference is indirect, in that the plaintiff is unable to obtain performance of the contract by the third person because he has been prevented from performing his part of the contract and thus from assuring himself of receiving the performance by the third person. But the interference with receiving the benefits of obtaining the performance is just as real as in a case coming under § 766.

Furthermore, it seems rather odd to permit one party to the contract to recover against the intruder but not the other. Yet that is exactly what would happen if Pennsylvania accepted § 766 but not § 766A. Thus in the case at hand, Coca Cola could recover from Weis Markets under § 766, but Mr. Paulhamus–the party who was most seriously injured–could not.

For all these reasons, this court believes that the Pennsylvania Supreme Court would adopt § 766A. Indeed the Superior Court indicated a propensity toward this in the case of Al Hamilton Contracting Co. v. Cowder, _____ Pa. Super. _____ 644 A.2d 188 (1994), where the court held that the plaintiff had not alleged sufficient facts to constitute a cause of action under § 766 and then went on to say, "Appellant also has not alleged that it

was prevented from meeting its contractual responsibilities to others. In the absence thereof, appellant is unable to state a cause of action." Id. at 191. The Superior Court's conclusion that the plaintiff did not state a cause of action under §766A is a clear indication the court would have permitted an action under §766A, had the allegations been sufficient.

In support of its argument that Pennsylvania would not accept § 766A, Weis Markets points to the federal case of Windsor Securities, Inc. v. Hartford Life Ins. Co., 986 F.2d 655 (3rd Cir. 1993). In Windsor, the Third Circuit did not conclude that Pennsylvania would not adopt the tort. In fact, it specifically stated that the case before the court did not require it to decide that question. Id. at 663. However, the court did caution against "expanding the tortious interference principle to recognize a § 766A 'hindrance' cause of action." Id. at 662.

The 3rd Circuit's concerns are twofold. First, the court felt that the § 766 and § 766A "may have different effects and justifications." Id. at 661. The court speculated that the effect of § 766 was to encourage "voluntary transactions by making the inducer bargain directly with the plaintiff promisee in order to obtain a promised advantage." Id. However, §766A had no such effect because imposition of liability under that section does not encourage the third party to bargain with the contracting promisee because the dispute does not involve the promisee–it merely involves the plaintiff promisor.

This court does not find the analysis convincing. We think that under either form of the tort, there are various motivations for the interference. In some cases, the interferor wants to derive for him or herself the benefit of the plaintiff's promise; in other cases, the

interferor wants to obtain the benefits of the other contracting party's promise; in still other cases, the interferor does not desire any contractual benefit–he or she merely wants to prevent the plaintiff from receiving the benefit of the other party's performance, perhaps out of spite, resentment, or revenge. Therefore, the result of § 766 is not always to encourage bargaining. Moreover, the result of §766A will sometimes encourage bargaining because the interferor will be motivated to go directly to either contracting party to obtain what he or she desires.

The other concern voiced by the 3rd Circuit is that § 766A duplicates protections already afforded through tort because the hindrance usually involves force, fraud, or other independently actionable conduct upon which the plaintiff may sue. Id. at 662. Under § 766 actions, by contrast, the plaintiff would not have a cause of action in tort because the conduct was directed toward the other contracting party.

While it is true that the means employed under §766A are often tortious in themselves, that is not always the case. See § 766A comment g. This point is made very clearly in § 767, which lists the factors in determining whether interference under any of the forms of the tort is improper. Comment c of § 767 states:

> The variety of means by which the actor may cause the harm are stated in § 766, Comments k to n. Some of them, like fraud and physical violence, are tortious to the person immediately affected by them; others, like persuasion and offers of benefits, are not tortious to him. . . . Under some circumstances the interference is improper even though innocent means are employed.

The case at hand is a perfect example of this. Ordinarily, Weis Markets' refusal to deal with a particular individual is not tortious. However, under these particular circumstances it may be, if the company's conduct is deemed "improper." Here, clearly,

there is no duplication of protections already afforded through contract law or tort. Without §766A, Mr. Paulhamus would have no cause of action against Weis Markets in tort, for Weis Market's conduct is not tortious in itself.[7] Similarly, Mr. Paulhamus would have no cause of action against Coca Cola in contract, for his employment contract was terminable at will. This case thus vividly illustrates how § 766A fills a gap within our legal system and allows Mr. Paulhamus to recover so long as he can convince a jury that Weis Markets acted improperly.

Finally, this court does not share the 3rd Circuit's concern that §766A "risks chilling socially valuable conduct and creates new liability of uncertain dimensions" because of the "amorphous nature of the tortious interference principle." Id. at 662-63. The balancing of factors used to determine whether conduct is improper, which are set forth in §767 and discussed at length in the comments, sufficiently guard against imposing liability for socially useful conduct.

II. Plaintiff's Evidence on the Elements of § 766A

Weis Markets has also argued that the plaintiff cannot present sufficient evidence to permit a jury to find in its favor at trial. In order for Mr. Paulhamus to prevail he must show by a preponderance of the evidence that: (1) he had an employment contract with Coca

---

[7] The plaintiff has argued that Brian Nichols' statement to John Engel that Mr. Paulhamus had violated company policy is a misrepresentation. However, it does not appear Mr. Paulhamus could successfully sue Weis Markets for fraud based on this statement because that statement did not cause the termination. Mr. Weis was fired because he could not service Weis accounts–not because a Weis employee told Coca Cola Mr. Paulhamus violated a policy. As discussed later, however, the misrepresentation could support an argument to show that Weis Markets' conduct was improper.

Cola, (2) Weis Markets interfered with that contract by preventing Mr. Paulhamus from performing or causing his performance to be more expensive or burdensome, (3) the interference was intentional, (4) the interference was improper, and (5) Mr. Paulhamus suffered a pecuniary loss because of the interference.

The first two elements are easily satisfied. Mr. Paulhamus' deposition and John Engel's affidavit establish that there was an employment contract. The fact that it was a terminable at will contract makes no difference, although it should be taken into account when determining damages. § 766A comment d. The plaintiff's evidence also shows that Weis Markets prevented Mr. Paulhamus from performing that contract. John Engel's affidavit states that servicing the Weis Market accounts was an essential part of Mr. Paulhamus' duties for Coca Cola and that he was terminated because Weis Markets refused to allow him to service them. Mr. Paulhamus can also establish that the interference was intentional, which means that Weis Markets either desired to interfere or knew that the interference was certain or substantially certain to occur as a result of its action. § 766A comment j. In his deposition Mr. Paulhamus stated he told Weis Markets employees on at least two occasions that he would lose his job if he were not permitted to service the Weis Markets accounts. The final element, pecuniary loss, is also easily satisfied, for Mr. Paulhamus was terminated from his position with Coca Cola.

The only element that is at all questionable is that of improper interference. Not surprisingly, this is the element that routinely presents the most difficult problems, for there is no clear-cut definition stating what type of conduct is improper. Rather, the issue is whether the interference is improper *under the particular circumstances*. As explained

above, certain conduct may be proper in some circumstances and improper in others, depending on the interrelation of the factors set forth in § 767. These factors are: the nature of the actor's conduct, the actor's motive, the interests of the plaintiff, the interests of the actor, the social interest of protecting the freedom of the actor, the social interest of protecting the contractual interests of the plaintiff, the proximity of remoteness of the actor's conduct to the interference, and the relations between the parties. The Introductory Note to § 767, as well as the comments, fully explore these factors and explain how they must be weighed against each other and balanced in determining whether an action is proper. Comment j of § 767 explains:

> it has been suggested that the real question is whether the actor's conduct was fair and reasonable under the circumstances. Recognized standards of business ethics and business customs and practices are pertinent, and consideration is given to concepts of fair play and whether the defendant's interference is not "sanctioned by the 'rules of the game.'"

In the end, it is a question of policy, as Holmes asserted back in 1894.[8] It is a societal determination whether the particular conduct was appropriate and whether it should be permitted. This judgment is made by a jury, which expresses the community mores.

Weis Markets argues that its conduct cannot be deemed improper because it merely refused to deal with Mr. Paulhamus. Weis Markets proclaims that after all, this is America, the land of freedom, where free enterprise is accorded the greatest protection. Here, no one may be forced to do business with another.

What Weis Markets fails to understand, however, is that one of the things which makes America so great is that we not only *grant* great freedoms, but we also *impose*

---

[8] Oliver Wendel Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 9 (1984).

restrictions on those freedoms. Quite simply, one person's rights end where another's begin. In fact, no right is absolute. Even those liberties we hold most dear, such as freedom of speech and of the press, can be taken away or restricted under certain circumstances–one may not shout "Fire!" in a crowded theater or deliberately defame a public official in the *New York Times*.

Section 766A is one such limitation on the right to do business with whomever one chooses. Weis Markets may, in most instances, make this choice–but not always. As comment b of §766 states,

> Deliberately and at his pleasure, one may ordinarily refuse to deal with another, and the conduct is not regarded as improper, subjecting the actor to liability. One may not, however, intentionally and improperly frustrate dealings that have been reduced to the form of a contract. There is no general duty to do business with all who offer their services, wares, or patronage; but there is a general duty not to interfere intentionally with another's reasonable business expectancies of trade with third persons . . . unless the interference is not improper under the circumstances.

This is in keeping with the general theory of tort discussed above: each person has a duty to every other person to refrain from intentionally harming them without justification. Mr. Paulhamus has gathered sufficient evidence to permit a jury to decide that Weis Markets violated this duty. It can do this by arguing that Weis Markets deliberately intended and desired to interfere with Mr. Paulhamus' job. In an action under § 766A, the issue of motive can carry great weight. Comment d of § 767 states:

> In determining whether the interference is improper, it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive the interference is almost certain to be held improper. A motive to injure another or to vent one's ill will on him serves no socially useful purpose.

> The desire to interfere with the other's contractual relations need not, however, be the sole motive. If it is the primary motive it may carry substantial weight in the balancing process and even if it is only a casual motive it may still be significant in some circumstances.

Mr. Paulhamus can show a bad motive by arguing that he did not violate the Weis policy because he did not leave Weis Markets in order to work for Coca Cola. He can then present evidence that Weis Markets knew he did not violate the policy and knew he would lose his job if he could not service Weis accounts, yet Weis Markets refused to allow him to service its accounts. Moreover, Weis Markets' Head Buyer Brian Nichols telephoned Coca Cola Plant Manager John Engel and stated that Mr. Paulhamus had violated the Weis policy and would not be permitted to service its accounts. Therefore, Mr. Paulhamus can argue that Weis did not merely refuse to deal with Mr. Paulhamus. It went further, by communicating directly with Mr. Paulhamus' employer and even misrepresenting to Coca Cola that he had violated a company policy–an allegation that could certainly harm Mr. Paulhamus' image with his employer.

Moreover, Mr. Paulhamus can bolster his argument that Weis Markets deliberately intended to interfere with his contract by presenting evidence that Weis allowed two of its former employees who subsequently worked for Pepsi to continue to service its accounts. This evidence would give rise to the implication that Weis Markets was not simply enforcing its company policy, but was deliberately targeting Mr. Paulhamus in an effort to have him terminated. If a jury believed Mr. Paulhamus' evidence and accepted the implications, the jury may well conclude that Weis Markets' conduct was improper because its primary motive was to injure Mr. Paulhamus.

In short, this case will largely turn on whether Mr. Paulhamus can convince a jury

that Weis Markets deliberately intended to interfere with his employment at Coca Cola. This may not be easy because Weis Markets will surely argue that it was merely following its well-established policy and that it had a right to do so. However, Mr. Paulhamus has gathered sufficient evidence to cast doubt on the company's motivation and he is therefore entitled to have a jury decide whether Weis Markets acted improperly.

Conclusion

For the reasons stated above, the court holds that Pennsylvania would adopt §766A of the Restatement (Second) of Torts, and that the plaintiff can establish the elements of this tort.

O R D E R

AND NOW, this _____ day of January, 1999, the motion for summary judgment filed by Weis Markets, Inc., is denied.

BY THE COURT,

Clinton W. Smith, P.J.