See para. 22

Case Name:

Poppa Corn Corp. v. Collins

Between
Poppa Corn Corp., and
Edward Collins also known as Ted Collins

[**2005**] **O.J. No. 1440**

138 A.C.W.S. (3d) 730

139 A.C.W.S. (3d) 173

Court File No. 04-BN-893

Ontario Superior Court of Justice

A.D.K. MacKenzie J.

Heard: April 4, 2005.
Judgment: April 13, 2005.

(43 paras.)

Civil procedure -- Injunctions -- Circumstances when not granted -- Balance of convenience -- Serious issue to be tried or strong prima facie case -- Sufficiency of damages in lieu of injunction -- Injunction sought by former employer of defendant to prevent him from soliciting clients of former employer was dismissed -- Former employer did not prove a strong prima face case, damages were sufficient to cover his potential lost profit and the balance of convenience favoured the defendant.

Motion by the plaintiff, Poppa Corn Corp., for an interlocutory injunction to restrain the defendant, Collins, from soliciting or approaching the customers of Poppa Corn -- Collins had formerly been a sales representative for Poppa Corn for several years before his employment was terminated, allegedly for cause -- Poppa Corn was in the business of providing prepared foods to concession stands -- Collins now worked for a competitor and had transacted with former clients of Poppa Corn -- When Collins was terminated, Poppa Corn had ensured that he left with no confidential records or client lists -- HELD: Motion dismissed -- Poppa Corn did not meet the burden of proving there was

a prima facie case to be tried because there was a lack of evidence that Collins was a senior employee who stood in a fiduciary relationship to Poppa and utilized confidential information in the new sales -- The court was not satisfied that Poppa would be unable to have reasonable redress in terms of damages for any loss of profit that might eventually be established -- The balance of convenience favoured Collins because if he were prevented from working in 80 per cent of the concession food industry it would effectively prevent him from obtaining any meaningful income, whereas the loss to Poppa if the injunction was not granted was only a portion of its profit.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure Rule 49

Counsel:

Mr. M.R. Banasinski, for the Plaintiff/Moving Party

Mr. C.H. Cassian, for the Defendant/Responding Party

ENDORSEMENT RE INTERLOCUTORY INJUNCTION

1 **A.D.K. MacKENZIE J.** (endorsement):-- The plaintiff moves for an interlocutory injunction to restrain the defendant from soliciting or approaching the customers dealing with the plaintiff prior to November 20th, 2003. The purpose of the restraint term sought is to prevent the defendant from soliciting the business of those customers or using or disclosing any confidential information relating to the plaintiff's business obtained by the defendant while he was employed by the plaintiff or its predecessor.

2 The motion is brought in the following circumstances.

3 On or about the 2nd of February, the plaintiff began this action claiming among other things the relief sought in the injunction on both an interlocutory and permanent basis.

4 On or about February 13th, 2004, the plaintiff moved without notice for an order for an interim interlocutory injunction for the same relief as the present motion for a period of 10 days.

5 On or about February 19th, 2004, a judge of this court ordered that the February 13th interim injunction be vacated. At that time, the presiding judge was informed by plaintiff's counsel that the plaintiff still intended to follow through to obtaining an interlocutory injunction for the same relief and to complete the filing of responding materials and cross-examine the defendant. On this basis,

the interlocutory injunction was adjourned without a fixed date.

6 On April 30th, 2004 the defendant moved for an order seeking among other things:

(a) dismissal of the plaintiff's injunction and motion adjourned sine die on February 19th, 2004; and
(b) for a response to the defendant's demand for particulars delivered on or about the 13th of February, 2004.

7 By an order dated the 30th of April, 2004, the court directed a timetable for the motion for the interlocutory injunction to proceed and for the delivery of an amended statement of claim by the plaintiff by way of response to the defendant's demand for particulars. In the result, the amended statement of claim was delivered and cross-examinations of the defendant and two witnesses for the plaintiff were duly conducted. The motion was scheduled for hearing on the 13th of December, 2004 but, due to the exigencies of the court, could not be reached at that time. The motion was put over to the 4th of April, 2005 on which date the motion was heard.

8 The salient facts may be briefly stated.

9 The plaintiff is in the business of selling food and equipment to concession food operators. These operators are in the business of food concessionaires located in amusement parks, fairs, exhibitions and various sporting or entertainment events. Some of the operators conduct their business on a seasonal basis and others on a year-round basis. As noted, the plaintiff is a supplier of prepared foods and equipment to these operators.

10 The plaintiff has approximately 80 per cent of the food concession business in Ontario both on a seasonal and year-round basis. It is not in dispute that the number of operators or clients of the plaintiff and any of its competitors in the Province of Ontario is stable and somewhat limited in number.

11 In or about May of 2002, the plaintiff entered the concession food supply industry by assuming the sales and distribution functions of a company called Super-Pufft.

12 The defendant is 33 years of age and has worked his entire working life from the age of 9 or 10 in the food concession business, initially under the aegis of his father's food concession business. In the years 1996 through 2002 until the plaintiff's acquisition of the sales function of Super-Pufft, the defendant worked as a sales representative for Super-Pufft. He continued to work as a sales representative for concession foods, including Super-Pufft products on behalf of the plaintiff. Although the defendant was initially the plaintiff's sole sales representative, by November, 2003, the defendant was one of three full-time sales representatives for the plaintiff.

13 The plaintiff did not assign specific territories or product lines to its sales representatives, encouraging sales representatives to develop sales of whatever available lines in any locality within

Ontario. It is not in dispute that each of the sales representatives had a group of clients which each of the sales representatives regarded as his or her clients for purposes of soliciting orders and filling orders, as well as maintaining good service relations with those clients.

14 At no time did the defendant enter into any written contract of employment, non-competition or non-solicitation of client agreements with either the plaintiff or Super-Pufft, the plaintiff's predecessor.

15 On or about the 20th of November, 2003, the plaintiff terminated the employment of the defendant, allegedly for cause. The allegations were that the defendant failed to remit monies due and owing from sales to his customers and that he also had falsified certain invoices so as to deprive the plaintiff of the benefit of the sale transactions covered by such invoices. As noted, these are allegations, the validity of which is contested and, I am informed, are the subject of another proceeding relating to a wrongful dismissal action.

16 On the day of termination, the defendant was told to leave the plaintiff's business premises, escorted to his vehicle which was then searched for the purposes of retrieving any confidential information such as client lists that might have been in the custody or control of the defendant in his vehicle. At that time, the defendant's laptop computer was also removed by a representative of the plaintiff but returned to him approximately 10 days following his termination. It is not in dispute that the defendant on the date of his termination did not have in his possession or control any client list or material containing confidential information relating to the plaintiff's business.

17 The plaintiff issued letters to all the defendant's customers informing them that the defendant was no longer a sales representative for the plaintiff and indicating that a new sales representative would be handling their accounts.

18 In January of 2004, the defendant was offered and accepted the position of sales representative with a competitor, Wonderland Food and Equipment Sales Inc. The competitor sells and distributes concession foods and equipment but does not sell or distribute any Super-Pufft products.

19 Since the commencement of his employment with the competitor, the defendant has had dealings with customers he previously serviced as a sales representative of the plaintiff and has transacted business with them in his capacity as sales representative for the competitor.

20 The plaintiff contends that these clients represent about $158,633.00 in lost sales to it and that if the defendant is allowed to solicit the plaintiff's customers, the plaintiff will lose approximately $1,200,000.00 in annual sales with approximately $480,000.00 in profits based on that volume of sales.

21 The evidence does not establish that most of the customers serviced by the defendant on behalf of the competitor represented by the lost sales amount were contacted by him. In fact, there is evidence most of the seasonal vendors who were customers of the plaintiff were known to the

defendant even before his employment with Super-Pufft, the plaintiff's predecessor.

22 Although the plaintiff contends that the defendant utilized confidential information obtained by him in the course of his employment with the plaintiff in obtaining business from the customers in question, no evidence has been put forward from which a reasonable inference could be drawn that any of these customers' accounts serviced by the defendant on behalf of the competitor were obtained through the use of confidential information obtained by the defendant in the course of his employment with the plaintiff.

23 The test for obtaining an interlocutory injunction has three branches:

(a) A preliminary assessment must be made on the merits of the case to establish there is a serious issue or question to be tried.
(b) The applicant would suffer irreparable harm if the injunctive relief were refused.
(c) The balance of convenience must be determined, i.e. which party would suffer greater harm from the granting or refusal of the injunctive relief.

RJR-McDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 (S.C.C.).

24 It must be kept in mind that in the circumstances of this motion, the plaintiff seeks to effectively restrain the defendant from soliciting sales from approximately 80 per cent of the concession food and equipment market. As this injunctive relief is in the nature of a restraint of trade, the requirement of "serious question to be tried" is enhanced in that the moving party must establish a strong prima facie case: Kohler Canada Co. v. Porter, [2002] O.J. No. 2418 and Drake International Inc. v. Wortmann et al. (1980), 27 O.R. (2d) 707 (Div. Crt.).

25 The plaintiff contends that the evidence in support of its motion establishes that a strong prima facie case has been made out, namely, that the defendant has breached his employment with the plaintiff by lying about his relationship with some of the plaintiff's clients, e.g. failing to collect overdue accounts receivable and misrepresenting the state of client's accounts receivable, and "by the nature of his business relationship with the plaintiff's clients which will enable him to springboard into a position of advantage using the plaintiff's confidential information" (see para. 34 - Plaintiff's Factum).

26 In response, the defendant submits that the plaintiff's evidence on the motion fails to identify:

(a) any evidence of direct or indirect solicitation of the plaintiff's customers by the defendant since his termination in November of 2003;
(b) any evidence of receipt or possession by the defendant of any documents or information of the plaintiffs which was confidential in its nature;

(c) the existence of any written or verbal agreements between the plaintiff and the defendant in which the defendant agreed to restrict himself from competing with the plaintiff after his termination or restrict himself from soliciting directly or indirectly the plaintiff's customers after his termination.

27 As well, the defendant contends that the plaintiff has failed to prove a prima facie case of fiduciary duty or obligation by the defendant to the plaintiff.

28 In this regard, the defendant submits the following propositions:

(a) Inherent in the nature of a fiduciary relationship is a position of disadvantage or vulnerability on the part of one of the parties which causes that party to place reliance upon the other party and requires the protection of equity acting upon the conscience of the other party.

(b) Knowledge of an employer's business operations or the customers' needs, wants and preferences or of their trade relations or terms is not sufficient enough in and of itself to put an employee with such knowledge into a position of power and the employer into a position of vulnerability to that employee.

(c) The defendant was an ordinary employee and not a senior employee of the defendant who, by the nature of his position, was exposed on a daily basis to the plaintiff's clients. This is insufficient of itself to create a fiduciary duty upon the defendant or otherwise oblige him to refrain from dealing with the plaintiff's customers after his termination.

(d) An employee who is not in a fiduciary obligation may, following the termination of his employment, compete for the business of his former employer's customers, in the absence of any contractual prohibitions: see Alberts et al. v. Mountjoy et al. (1983), 16 O.R. (2d) 682 (H.C.J.).

29 I am not persuaded that the plaintiff has established there is a prima facie case to be tried. The evidence in support of a finding that the defendant was a senior employee who stood in a fiduciary relationship to his employer and who utilized confidential information relating to the tastes and preferences of customers who were previously known to him before his employment with the employer is at best tenuous. The plaintiff has accordingly failed to satisfy the evidentiary burden for the first branch of the test.

30 In any event, the second branch of the test, irreparable harm will be addressed.

31 The essence of irreparable harm is harm or loss that cannot otherwise be compensated for in a damages award.

32 The plaintiff contends that loss of market share can constitute irreparable harm and that to date

the plaintiff has lost approximately $75,000.00 in net profits from clients serviced by the defendant since his termination.

33 As well, the plaintiff contends that the defendant is not in a financial position to pay any damages and that this aspect can also constitute irreparable harm.

34 In support of the latter contention, the plaintiff contends that the defendant has no financial means of satisfying any judgment in that his liabilities exceed his assets.

35 This latter argument may be readily disposed of. The mere fact that at any snapshot point in time, the party's liabilities may exceed his assets does not in and of itself constitute that party being judgment-proof in terms of any perspective damages award against that party. Such a contention is without merit in the context of establishing irreparable harm.

36 The defendant in response contends that loss of market share and goodwill cannot be inferred but rather must be established by "clear evidence": see Toronto.com v. Sinclair [2000] F.C.J. No. 795 (F.C.T.D.). In aid of this submission, the defendant submits the facts that:

(a) the food concession sales market is limited with no significant new customers in the market; and
(b) the plaintiff has, in its materials, quantified its damages based on sales generated by the defendant prior to his termination,

effectively preclude the plaintiff from stating the lost profits allegedly arising from the defendant's cannot be quantified and thus leads to a finding of irreparable harm. In other words, if damages are susceptible of quantification as an adequate remedy and the defendant would be in a position to pay such damages, then no interlocutory injunctive relief would be granted in the ordinary course: see Kanad Tsushin Kogyo Co. Ltd. v. Coveley (1997), 96 O.A.C. 324 (Div. Crt.).

37 I find that the plaintiff has failed to meet the second branch of the test. I am not satisfied that the plaintiff would be unable to have reasonable redress in terms of damages for any loss of profit that might eventually be established and for which the defendant would be found liable. Accordingly, the essential element of the irreparable harm test has not been met here.

38 I turn now to the third branch of the test, i.e. the balance of convenience factors.

39 In sum, the plaintiff's position is that greater harm will occur to the plaintiff by failing to grant the injunctive relief than will be incurred by the defendant in granting the relief. The plaintiff contends that since the defendant is a sales representative, described by the plaintiff as a "portable occupation", the defendant will not incur harm if the injunction is granted because he can still continue to work as a sales representative, albeit in a different industry than the concession food industry. The plaintiff further contends that if the injunction is not granted, the plaintiff would be unable to change its business and seek other product lines. Accordingly, it is contended that the

injunctive relief is not to harm or injure the defendant, but rather to preserve and protect the plaintiff's economic interests.

40 In response, the defendant submits that the substantial part of his earnings in sales arises through commissions and points out that in his employment arrangement with the plaintiff, his commission income would represent approximately 75 per cent of his total annual income. He contends further that if prevented from doing business with any customers, existing/former/potential of the plaintiff, he would effectively be cut off from 80 per cent of the concession food and equipment sales market in Ontario, being the market share currently held by the plaintiff. The defendant points out he has no experience in any other industry nor does he have any contacts in any other industry which would make him attractive to a prospective employer and that if he is prevented from participating in the concession food and equipment sales market in Ontario, he would be faced with the prospect of retraining to gain experience in another field of work at the age of 33 years.

41 In sum, the defendant contends that he would lose much more if the injunctive relief was granted than the plaintiff would if the injunctive relief were not granted. He points out that of the plaintiff's annual sales revenues of approximately $8 million dollars and that his contribution to this gross revenue in his last year of employment was approximately $1,100,000.00 dollars. He argues that if he does take some or all of this business away from the plaintiff, the plaintiff will still be in a viable position although with less profits. However, if he were prevented from working in approximately 80 per cent of the concession food and equipment industry, this would effectively prevent him from obtaining any meaningful income, resulting in the probable loss of his current position in the same industry.

42 I am persuaded that the plaintiff has failed to meet the third branch of the test, namely, that the balance of convenience favours the granting of the injunctive relief. I accept the submissions of the defendant and reject the submissions of the plaintiff in this regard.

43 In the result, I dismiss the plaintiff's motion for injunctive relief as requested. In the absence of any Rule 49 offers, the defendant will be entitled to his costs herein. If the parties are unable to agree with the quantum of costs, I will entertain written submissions, not to exceed 4 pages in length, exclusive of supporting materials, according to the following timetable:

(a) by the defendant with 30 days of the date of issuance of this endorsement;
(b) responding materials by the plaintiff within 10 days of receipt of the defendant's materials; and
(c) reply, if any, by the defendant within 7 days of its receipt of the responding submissions of the plaintiff.

A.D.K. MacKENZIE J.