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Jet Print Inc. v. Cohen

Between

Jet Print Inc. and Jet Copy Centres Ltd., plaintiffs, and
Moses Cohen, Isaac Cohen, M.C. Ash Holdings Ltd., Leoluna
Holdings Inc. and DMHC Plus Inc., defendants

[1999] O.J. No. 2864

Court File No. 99-CV-162779

Ontario Superior Court of Justice
Nordheimer J.

Heard: August 5, 1999.

Judgment: August 9, 1999.

(14 pp.)

Injunctions — Interlocutory or interim injunctions — Requirement of strong prima facie case or appearance of right — Circumstances when injunction will not be granted — Breach of negative covenant — Practice — Judgments and orders — Summary judgments — Counterclaim or set-off, effect of.

Motion by the plaintiffs, Jet Print and Jet Copy Centres, for an interlocutory injunction. Cross-motion by the defendants, Cohen and Ash, for summary judgment on amounts owing as unpaid commissions. The plaintiff companies employed the individual defendants as salespersons. Their employment agreements contained a two-year restrictive covenant and a non-solicitation clause upon termination of employment. The agreements also contained an acknowledgement that a breach thereof would cause irreparable harm. The individuals subsequently incorporated corporations through which their commissions were paid. In 1998, the plaintiffs accused the defendants of fraudulently submitting invoices, and the defendants terminated their relationships with the plaintiffs. They went into business together, and the plaintiff companies alleged that the defendants solicited and accepted work from the plaintiffs' customers in violation of the employment agreements.

HELD: Motion and cross-motion dismissed. There was no strong prima facie case that the employment agreements remained binding. It was arguable that the employment agreements ceased to apply given the change in the relationship between the parties when the individual defendants began operating through their companies. Employment contracts containing restrictive covenants were strictly construed. It was doubtful that the covenants were reasonable in scope. There was no evidence that the individual

defendants took any customer lists with them, or that they were key personnel who owed fiduciary duties. There was insufficient evidence of irreparable harm. A contractual waiver as to the existence of irreparable harm could only be construed as some evidence upon which a court could exercise its equitable jurisdiction. The balance of convenience favoured the defendants, who would face considerable limits on their ability to earn a living if the injunction were granted. The question of the unpaid commissions was best left for trial.

[Ed. note: Supplementary reasons for judgment were released September 13, 1999. See [1999] O.J. No. 3329.]

Counsel:

R. Lachmarsingh and W.K. Juriansz, for the plaintiffs.

J. Diamond, for the defendants.

1 **NORDHEIMER J.**— This is a motion for an interlocutory injunction prohibiting the defendants, Moses Cohen, M.C. Ash Holdings Ltd., Isaac Cohen and Leoluna Holdings Inc. from:

"directly or indirectly attempting in any manner to solicit from the plaintiffs' clients any business of the type performed by the plaintiffs or to persuade any of the plaintiffs' clients to cease to do business or to reduce the amount of business which any such client has customarily done or contemplates doing with the plaintiffs and to prohibit those defendants from rendering any services to the plaintiffs' clients of the type rendered by the plaintiffs to their clients."

There was no relief sought in this motion against the defendant, DMHC Plus Inc. so when I make future references to the defendants in these reasons, I am expressly excluding that defendant.

2 There were volumes of material filed on this motion. I do not intend to review all of it in these reasons. A trial judge will ultimately determine the facts of this case. I must decide the narrower issue of whether an interlocutory injunction should be granted. I therefore intend to restrict my recitation of the facts to those which I feel are necessary to determine that narrower issue.

Background

3 The corporate defendants are personal corporations owned by the individual defendants. The individual defendants were each employed as salespersons by the plaintiffs. The defendant, Moses Cohen, was employed as a salesperson from on or about May 16, 1990 and the defendant, Isaac Cohen, was employed as a salesperson from on or about February 15, 1991. Both Moses and Isaac Cohen are brothers of Joe Cohen who is one of the two principals of the plaintiff companies.

4 Both of the individual defendants signed employment contracts with the plaintiff, Jet Copy Centres Ltd. The employment agreement of Moses Cohen is dated May 16, 1990 and the employment agreement of Isaac Cohen is dated February 15, 1991. The basic terms of the employment agreements are identical. In particular, the employment

agreements provide:

"Accordingly, the Employee agrees that while he is in the Employer's contractual relationship and for a two (2) year period after the termination of his contractual relationship for any reason whatsoever, he shall not directly or indirectly:

(i) attempt in any manner to solicit from any client (except on behalf of the Employer) business of the type performed by the Employer or persuade any client of the Employer to cease to do business or to reduce the amount of business which any such client has customarily done or contemplates doing with the Employer, and subject to Paragraph 11 hereafter whether or not the relationship between the Employer and such client was originally established in whole or in part through his efforts; or

...

(iii) render any services of the type rendered by the Employer to their clients to or for any client of the Employer unless such services are rendered as an employee or consultant of the Employer."

5 The employment agreements then go on to provide a definition of client to include clients existing at the time of the termination of the contractual relationships together with any clients during the proceeding year and any prospective clients to which the Employer had made a presentation within the proceeding two years. Finally, there is an acknowledgement in the employment agreements that any breach or threatened breach of the above restrictions:

"will cause irreparable injury to the Employer and that money damages will not provide an adequate remedy to the Employer."

6 The individual defendants' evidence is that they were told that these employment agreements were standard for all employees. They say that despite their requests for an opportunity to review the agreements and seek legal counsel with respect to them, the plaintiffs insisted that they be signed and the individual defendants acquiesced in that demand. The individual defendants also say that they were not provided with copies of the agreements until after this litigation was commenced.

7 In May, 1991, Isaac Cohen incorporated the defendant Leoluna. From that point forward, Leoluna issued invoices to the plaintiff, Jet Copy, for all commissions earned on sales made by Isaac Cohen and the plaintiff, Jet Copy, would in turn issue cheques payable to Leoluna in payment of those commissions. Similarly, in January, 1994, Moses Cohen incorporated the defendant, M.C. Ash, and thereafter all commission cheques for sales made by Moses Cohen were issued and made payable to M.C. Ash. After these personal corporations came on the scene, the plaintiffs no longer made any deductions normally made for employees, such as, income tax, unemployment insurance, CPP, etc. In the same fashion, the plaintiffs no longer issued T4 slips for the individual defendants.

8 In late October, 1998, Isaac Cohen was accused by Joe Cohen and the plaintiffs' controller of fraudulently processing and submitting invoices on behalf of Leoluna. The plaintiffs claim that as a consequence of this event, they terminated Isaac Cohen effective

November 30, 1998 although no letter of termination exists. Isaac Cohen, on the other hand, says that in light of the accusations made, which he denies, he and Leoluna simply ceased to have any further dealings with the plaintiffs. On January 11, 1999, Moses Cohen terminated the relationship between M.C. Ash and the plaintiffs. Moses Cohen says that he did so because the plaintiffs refused to pay a bonus that was due to M.C. Ash. The plaintiffs, in contrast, say that Moses Cohen did not give them any explanation for the termination. However, there is a letter from M.C. Ash to the plaintiffs dated January 12, 1999 advising that they had breached the payment arrangements by failing to pay the bonus. The letter threatened to commence legal action to recover the amounts due unless payment was made.

9 Subsequently, Isaac and Moses Cohen went into business together through two companies, InStep Print & Copy and Prototype Print & Copy. It is conceded by the defendants that they solicited customers of the plaintiffs for work and they also received work directly from customers of the plaintiffs without any solicitation. The central issue in this motion is whether the defendants should be restrained from soliciting or accepting work from customers of the plaintiffs in accordance with the restrictive covenants in the employment agreements or on the basis that the individual defendants owed fiduciary duties to the plaintiffs which are being breached through their actions.

Injunctive relief

10 In order to obtain an interlocutory injunction, the plaintiffs would normally have to satisfy the well established test of demonstrating that (i) there is a serious issue to be tried, (ii) the plaintiffs will suffer irreparable harm if the injunction is not granted and (iii) the balance of convenience favours the granting of the injunction. [See Note 1 below] However, in cases involving restrictive covenants in employment contracts, courts have generally adopted the higher threshold that the plaintiff must establish a strong prima facie case before injunctive relief will be granted. For example, in *Gerrard v. Century 21 Armour Real Estate Inc.* (1991), 4 O.R. (3d) 191 (Gen. Div.), Madam Justice Feldman said at p. 198:

"When an interlocutory injunction is sought to enforce a restrictive covenant, the applicant should make out a strong prima facie case."

There then follows a number of citations of other cases in which the same principle is enunciated.

Note 1: See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.)

11 Counsel for the plaintiffs, in response to a question from me, stated that the plaintiffs' case could meet either of the tests, whether serious issue or strong prima facie case, and therefore he took no position as to which test was the appropriate one. In my view, when the injunction sought is intended to place restrictions on a person's ability to engage in their chosen vocation and to earn a livelihood, the higher threshold of a strong prima facie case is the more appropriate test to be applied. I respectfully agree with the

approach taken by Madam Justice Feldman in this regard in the Gerrard case.

Strong prima facie case

12 There are two parts to the plaintiffs' submissions on the strong prima facie case. First and foremost are the restrictive covenants in the employment agreements and second is the argument that the individual defendants owed fiduciary duties to the plaintiffs. In terms of the first part, I am not persuaded that the employment contracts are binding in light of the change in the relationship between the individual defendants and the plaintiffs when their respective personal companies came into the picture. While it will ultimately be up to the trial judge to determine this issue, it seems to me that there is a fair argument that the employment contracts fell by the wayside when the plaintiffs entered into these new arrangements by which the individual defendants ceased to be treated as employees and became more in the nature of independent contractors through the arrangements between the corporate defendants and the plaintiffs. It was, of course, open to the plaintiffs to enter into new contracts with the corporate defendants in which similar restrictive covenants could have been placed. The individual defendants might even have been made parties to such new contracts. This did not happen. I also note that the plaintiff, Jet Print, cannot rely on the employment contracts since it was not a party to them.

13 In my view, employment contracts which contain restrictive covenants should be strictly construed. They should also be construed against the party who drafted the agreement if there is any ambiguity that results from the arrangements. After the corporate defendants came into existence, it is clear that the individual defendants were no longer treated as employees. It is certainly arguable that these new arrangements implicitly terminated the existing employment agreements. At the very least, this issue is a live one for trial. In these circumstances, I cannot conclude that the plaintiffs have a strong prima facie case that the employment contracts were still binding on the individual defendants at the time of the alleged breaches.

14 Further, even if the employment contracts were binding on the individual defendants, I have serious reservations as to the reasonableness of the restrictive covenants contained therein. First, I am not satisfied on the evidence that a two year restriction on salespersons working in a print/copy business is reasonable. That seems to me to be an inordinately lengthy period of restriction for such positions. Secondly, I have even greater reservations about the restriction by which the plaintiffs seek to prevent the individual defendants from doing work for customers who approach them without any solicitation. The effect of that restrictive covenant would be that a third party customer who wished to continue to use the services of either or both of the individual defendants without any encouragement or urging on the part of the individual defendants would still be precluded from using their services. I am unaware of any legal principle or case authority (and none was cited to me) that would support such a broad restriction.

15 Further, there is no provision in the employment contracts which makes the restrictive covenants severable. There is, therefore, no foundation for carving out, or cutting back, the restrictive covenants over which I have such concerns. The restrictive covenants therefore stand or fall as a whole and in my view there is a serious issue as to whether they can stand.

16 The plaintiffs contend that the restrictive covenants are reasonable when one considers that they only seek to restrain the defendants from doing work for their clients and that there are a large number of other potential customers for which the defendants could perform services. While that may be, it is not an answer to the two concerns I have expressed above. Further, a review of the customer list claimed by the plaintiffs shows that there are approximately 1700 businesses claimed by the plaintiffs as their customers. Included therein are some of the major employers in the City of Toronto including chartered banks, chartered accountants, law firms, government agencies, hospitals, etc. Given that the defendants' business is within the confines of the City of Toronto, I am not convinced that there is such a large remaining market that it would be reasonable to restrict the defendants to only that market.

17 In terms of fiduciary duties, I note at the outset that the plaintiffs concede that there is no evidence on this motion that the individual defendants took any customer lists with them when they left their employ with the plaintiffs. Rather, the plaintiffs contend that the individual defendants were "key personnel" such that fiduciary obligations rested on them not to solicit, or do business with, the plaintiffs' customers. I view the evidence as falling well short of establishing that either of the individual defendants were such high level or "key" employees that they would be subject to fiduciary duties restricting their activities after they have left their employment. As observed by the British Columbia Court of Appeal in *Barton Insurance Brokers Ltd. v. Irwin*, [1999] B.C.J. No. 220, at para. 28, per Hall, J.A.:

"In my view, it is to be seriously doubted that it is the current law of this country that all former employees are to be restrained on pain of damages from soliciting customers of the former employer. Unless a defendant is found to be a key employee or director or as perhaps was found to be the situation in the Manitoba case of *Hudson's Bay Company v. McClocklin* 42 Man. R. (2d) 283 (Q.B.) when an employee is in effect "the whole show", a fiduciary duty preventing solicitation of former customers will not usually be found to exist." (emphasis added)

18 There is insufficient evidence before me to establish that either of the individual defendants were involved in the management of the overall operations of the plaintiffs or that they were otherwise part of the "top management" of the plaintiffs [See Note 2 below] - to use the words of Mr. Justice Laskin (as he then was) in *Canadian Aero Service Ltd. v. O'Malley et al.*, [1974] S.C.R. 592. I cannot therefore conclude that there is a strong prima facie case that the individual defendants owed fiduciary duties to the plaintiffs.

Note 2: I note in this respect that even the plaintiffs' witness, Mr. Ponte, when cross-examined was not prepared to accept that either of the individual defendants were managers with the plaintiffs. He preferred instead to refer to them as part of the "manager's team".

Irreparable harm

19 Although my finding with respect to the failure to establish a strong prima facie

case is sufficient to dispose of the motion for an injunction, I consider it prudent to address the other two parts of the test for injunctive relief. The plaintiffs claim that they will suffer irreparable harm if an injunction is not granted. The only affidavit evidence filed in support of the plaintiffs' motion came from Jacques Ponte who is the secretary of Jet Print and the President of Jet Copy. Mr. Joe Cohen holds the corresponding positions, that is, he is secretary of Jet Copy and President of Jet Print. Mr. Joe Cohen did not file any affidavit in this proceeding. In Mr. Ponte's first affidavit, he says at paragraph 91:

"I do verily believe that if the injunctions requested herein are not granted, Jet will suffer irreparable harm that will not be adequately compensated by damages. Jet has incurred substantial losses to date as a direct result of Moses' and Isaac's solicitation of Jet's clients, and is also at risk of future losses of its traditional clients, goodwill and market share. If the said losses persist or worsen over time, Jet's future will be at risk, and the jobs of its 45 full-time and 6 part-time employees may be in jeopardy."

20 In making that assertion at the time, Mr. Ponte was relying on a decline in sales in both plaintiff companies from December, 1997 to December, 1998. However, on his cross-examination, Mr. Ponte admitted that he had no evidence to tie that decline in sales to any activities on the part of the defendants. Indeed, Mr. Ponte said that he "assumed" the defendants were part of the problem. There is very limited financial information that has been forthcoming from the plaintiffs in this proceeding. What financial information there is shows that both plaintiff companies had experienced a downturn in their financial performance before the departure of the individual defendants. For example, Jet Print went from a profit of \$62,645 for the fiscal year ending September 30, 1997 to a loss of \$61,444 for the fiscal year ending September 30, 1998. Jet Copy saw its profit decline from \$86,633 for the fiscal year ending January 31, 1997 to \$19,469 for the fiscal year ending January 31, 1998. Obviously there were other factors affecting the financial performance of the plaintiff companies in the relevant time frame.

21 No other evidence is offered by the plaintiffs in support of their contention that they would suffer irreparable harm if an injunction is not granted. There is clearly an onus on a party seeking an injunction to place sufficient evidence before the court on which a finding can be made that irreparable harm will be sustained if the injunction is not granted. As stated by Molloy, J. in *Chen v. Canada Trustco Mortgage Co.* (1997), 13 C.P.C. (4th) 186 at p. 188:

"The onus is on the person seeking the injunction to establish irreparable harm. This must be based on evidence before the court. As stated by Epstein J. in *754223 Ontario Ltd. v. R-M Trust Co.*, [1997] O.J. No. 282 (January 20, 1997) Doc. 96-CU-114787, RE 7166/96 (Ont. Gen. Div.), 'Irreparable harm cannot be founded upon mere speculation'."

22 Again, in my view, the evidence proffered by the plaintiffs in support of their assertion that they will suffer irreparable harm if an injunction is not granted falls well short of what would be necessary for me to come to that conclusion.

23 I should at this stage mention one other issue. The defendants submitted that there has been considerable delay by the plaintiffs in bringing this motion on for hearing and that the delay itself negates any suggestion that irreparable harm is being or will be

suffered by the plaintiffs. In this regard, the defendants rely on the decisions in *Union Bank of Switzerland v. Batky et al.* (1998), 157 D.L.R. (4th) 364 (Ont. Div. Ct.) and *Dylex Ltd. v. Factory Carpet Corp.* (1989), 44 C.P.C. (2d) 96 (Ont. H. C.). I note first that the issue of delay was expressly not relied upon by the Divisional Court in the *Union Bank* case as a basis for its finding that the *mareva* injunction in that case should be set aside. I note that in the *Dylex* case the delay was in the order of three years between the conduct complained of and the hearing of the injunction.

24 In this case, the delay amounts to some seven months. While I agree that a party seeking an injunction is obliged to move expeditiously to obtain such relief, I am not prepared on the material before me to find that the delay here was so inordinate as to, on its own, give rise to the conclusion that any damage being suffered by the plaintiffs could not be irreparable. In addition, in this regard, I am not convinced that all of the delay reflected in this matter can be laid solely at the feet of the plaintiffs. I appreciate that Mr. Justice C. Campbell, in an endorsement on an earlier motion in this matter, made the observation that:

"On the material before me, I am satisfied that the delay in prosecuting an interlocutory interim injunction motion for over five months, is inordinate, that much of the responsibility for that delay rests with the positions taken by the Plaintiffs."

I do not take issue with that observation. However, that alone does not in my view amount to the type of delay that would lead me to a conclusion that irreparable harm was not per se being suffered by the plaintiffs.

25 The only other basis offered by the plaintiffs for a finding of irreparable harm was the term in the employment contracts quoted earlier which says that any breach or threatened breach of the restrictions:

"will cause irreparable injury to the Employer and that money damages will not provide an adequate remedy to the Employer."

26 The plaintiffs say that this term in the employment agreement is sufficient to establish irreparable harm and there is no need to produce evidence to support such a finding. In other words, the contractual term provides all that is necessary for the finding of irreparable harm. In support of this assertion, the plaintiffs rely on the decision in *London Life Insurance Co. v. Heaps et al.* (1993), 50 C.P.R. (3d) 438 (Ont. Gen. Div.) in which Mr. Justice Weekes said at p. 444:

"At present, I am satisfied that the actions of Heaps in soliciting the business of his former London Life clients is a violation of cl. 8 of the employment agreement. The agreement stipulates that any such violation will cause irreparable harm and that an injunction is an appropriate remedy. That alone would be enough to lead to the conclusion that London Life will suffer irreparable harm."

I note that, notwithstanding the above statement, Mr. Justice Weekes then went on to find that there was other evidence before him upon which he could conclude that irreparable harm would be suffered by London Life.

27 With respect, I believe that the above statement by Mr. Justice Weekes goes too far. I note that no authority is cited for the proposition and I confess to having some

considerable difficulty with it. The granting of an injunction is an equitable remedy. I do not believe that the parties to a contract can obviate or waive the usual requirements on which a court would need to be satisfied before exercising its equitable jurisdiction. While such a term in a contract might provide some evidence in favour of a finding of irreparable harm, I do not see that it can be a complete answer to that requirement and thereby preclude the court from inquiring into the issue, particularly in a case such as here where there is otherwise an absence of evidence that would lead to that conclusion.

28 I find support for my view in Mr. Justice Sharpe's text, *Injunctions and Specific Performance*, (2nd edition) wherein he says at para. 7.730:

"This suggests that the agreement will be relevant, although perhaps not determinative in the assessment of the nature of the plaintiff's interest in obtaining actual performance rather than damages. The court, however, maintains an overriding discretion to refuse the remedy."

In a footnote to that paragraph, Mr. Justice Sharpe notes the leading American case of *Stokes v. Moore*, 77 So. 2d 331 (Alabama S.C., 1995) in which the following statement appears at p. 335:

"We do not wish to express the view that an agreement for the issuance of an injunction, if and when a stipulated state of facts arises in the future, is binding on the court to that extent. Such an agreement would serve to oust the inherent jurisdiction of the court to determine whether an injunction is appropriate when applied for and to require its issuance even though to do so would be contrary to the opinion of the court."

29 I conclude therefore that the presence of the above quoted clause in the employment agreements does not obviate the need for the plaintiffs to satisfy the court that they will suffer irreparable harm if the injunction is not granted. For the reasons I have already given, I find that the plaintiffs have not satisfied that requirement.

Balance of convenience

30 The final issue of balance of convenience can be dealt with shortly. Simply put, in light of the conclusions I have reached that the plaintiffs have not established a strong prima face case nor that they will suffer irreparable harm, it follows almost inevitably that the balance of convenience cannot favour the plaintiffs. The plaintiffs have had salespersons come and go over the period of their existence. They did not pursue any of those salespersons although the employment agreements were said to be standard for all salespersons. I note, of course, that one very significant difference between those situations and this case is that the individual defendants here are both brothers of one of the principals of the plaintiffs. That factor may be playing a significant role in why this matter is being pursued. I cannot help but observe in this regard that no affidavit was filed by Joe Cohen on this motion notwithstanding his position with the plaintiffs, the fact that he first discovered the alleged solicitation and that he participated in obtaining the execution of the employment agreements.

31 In any event, in my view the impact on the defendants by the granting of an injunction, given the restrictions it would place on their ability to earn a livelihood, would

be considerably greater than the impact of the plaintiffs from the refusal to grant the injunction. The balance of convenience in my view, therefore, favours the defendants.

Cross-motion

32 There is a cross-motion for summary judgment by the defendants, Moses Cohen and M.C. Ash, against the plaintiffs for an amount which the plaintiffs acknowledge is due and owing to these defendants for unpaid commissions and bonuses earned prior to the end of the arrangements between the parties. However, the plaintiffs plead a right of set-off against this amount for the damages which are claimed by them in this proceeding.

33 The amount in issue is \$16,400.00. It is evident to me that even if these defendants were successful in their motion for summary judgment, a stay of execution on any such judgment might well be appropriate. Indeed, counsel for the defendants essentially accepted that this would likely be the result.

34 The law surrounding a claim of set-off can be complicated. The plaintiffs rely on the decision in *Telford et al. v. Holt et al.* (1987), 41 D.L.R. (4th) 385 (S.C.C.) in which the Supreme Court of Canada held that a right of set-off exists at law if both obligations are debts and both are mutual cross-obligations. Certainly the respective claims here arise from the same contract or contractual relationships and could therefore be characterized as mutual cross-obligations. The Supreme Court of Canada also held that a right of set-off exists in equity even though there is no mutuality and even though the cross-obligations are not debts. Thus it can exist for a non-liquidated sum. It appears therefore that the unliquidated claim for damages by the plaintiff might give rise at least in equity to a right of set-off.

35 The application of the defence of set-off is not so clear that I am prepared to determine it on a motion for summary judgment given the high threshold established for such motions by the Court of Appeal in cases such as *Aguonie v. Galion Solid Waste Management Inc.* (1998), 156 D.L.R. (4th) 222 and *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257. I consider, in the end result, that it is a matter best left for the trial judge to determine in the context of the overall determination of the action.

Conclusion

36 I conclude that the plaintiffs have not been able to satisfy any of the necessary requirements for the granting of an interlocutory injunction in the circumstances and on the evidence that is before me. The motion is therefore dismissed. Counsel may make written submissions to me on the appropriate disposition of costs which submissions I would appreciate receiving by the end of this month.

37 The cross-motion for summary judgment is also dismissed but given that it occupied very little of the time taken up by this motion, I would make no award of costs with respect to the cross-motion.

NORDHEIMER J.

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