

CITATION: Print N' Promotion (Canada) Ltd. v. Kovachis, 2011 ONCA 23
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COURT OF APPEAL FOR ONTARIO

Cronk, Armstrong and Epstein JJ.A.

BETWEEN

Print N' Promotion (Canada) Ltd.,
carrying on business as megaposter.ca

Respondent

and

Norman Kovachis, Alexander N. Kovachis, Zoe Kovachis,
Tommy Kovachis, William Kovachis, and Alexandra Lorraine Leyland

Appellants

Andrew M. Robinson and Megan Mackey, for the appellant Alexander N. Kovachis

Jayson W. Thomas, for the remaining appellants

Chris Dockrill, for the respondent

Heard: December 17, 2010

On appeal from the judgment of Justice Lois B. Roberts of the Superior Court of Justice,
dated November 13 and December 14, 2009.

Cronk J.A.:

(1) Introduction

[1] The appellant members of the Kovachis family (collectively, the “Landlord”) own commercial premises located at 340 Adelaide Street West, in the City of Toronto, in the

heart of Toronto's entertainment district. Pursuant to an assignment of lease made as of April 6, 2004 (the "Head Lease"), the Landlord leased the premises to 2043391 Ontario Inc. (the "Tenant") for use as a bar and restaurant.

[2] The Head Lease was for a term of five years, ending May 31, 2008, with an option to renew for a further five years. The Head Lease provided for the payment of monthly rent by the Tenant, in escalating amounts over its term. The non-payment of rent after five consecutive business days from the due date constituted an event of default under the Head Lease, entitling the Landlord to terminate the Head Lease and re-enter the premises.

[3] The Head Lease also afforded the Tenant the right to sublet the exterior western wall of the leased premises for advertising and signage purposes with the Landlord's consent, which consent could not be "unreasonably withheld". Rental revenues thereby generated were to be shared by the Tenant with the Landlord on terms stipulated in the Head Lease.

[4] This appeal arises from a dispute between the Landlord and the respondent Print N' Promotion (Canada) Ltd. (the "Subtenant"), an advertising and media company that entered into a sublease with the Tenant for the use of the exterior western wall of the leased premises. The main issue is whether the conduct of the Landlord in purporting to terminate the Head Lease and refusing to allow the Subtenant to use the western wall

entitles the Subtenant to damages from the Landlord for the tort of intentional interference with the contractual relations and economic interests of the Subtenant.

(2) Background

[5] The Landlord experienced various difficulties in collecting rent on a timely basis from the Tenant. On one occasion, in 2005, the Landlord locked out the Tenant for non-payment of rent. This dispute was settled and the Tenant was allowed to re-enter the leased premises. On another occasion, in 2006, a monthly rent cheque from the Tenant was returned for insufficient funds. When replacement rent was furnished, the Tenant was again permitted to re-enter the premises.

[6] On September 7, 2006, the Landlord purported to terminate the Head Lease and changed the locks on the leased premises, claiming failure by the Tenant to pay rent due for September 2006. When the Tenant, acting on its own initiative, re-entered the premises on two occasions, the Landlord again locked the Tenant out, on September 14 and September 16, 2006.

[7] On September 20, 2006, the Tenant entered into a written sublease agreement with the Subtenant for use of the exterior western wall of the leased premises (the "Sublease"). The dispute between the Landlord and the Tenant regarding the Head Lease was then ongoing and the Landlord's consent to the Sublease was not obtained. The Landlord refused to recognize the validity of the Sublease.

[8] On September 22, 2006, when discussions between the Landlord and the Tenant had failed to resolve the dispute regarding the Tenant's occupancy and use of the leased premises, the Tenant and the Subtenant applied to the court for relief. The Tenant sought relief from forfeiture of the Head Lease, plus damages. The Subtenant claimed against the Landlord for damages for the tort of intentional interference with contractual relations and economic interests. On the same day, pursuant to a consent court order, the Tenant was permitted to re-enter the leased premises, subject to a subsequent hearing regarding relief from forfeiture and the other issues between the parties.

[9] By subsequent court order dated March 19, 2007, Swinton J. of the Superior Court of Justice granted the Tenant relief from forfeiture of the Head Lease, ordered that the application be converted to an action, and directed that the issues of liability and damages be tried in the usual course. In her reasons, she indicated that the issue whether the Tenant was in breach of the Head Lease would ultimately be decided at trial. She also held that, "[T]he claims of [the Subtenant] cannot be properly assessed without a proper pleading of the claims against the [Landlord] and a trial to determine liability and assess damages, if liability is established."

The Trial

[10] On October 16, 2007, the Tenant abandoned the leased premises. It thereafter discontinued its action against the Landlord, leaving the Subtenant as the sole plaintiff.

[11] The trial was conducted in June 2009 before Roberts J. of the Superior Court of Justice. Her central findings included:

- (1) the Landlord did not have “a valid reason for terminating the [Head Lease] at any time in September 2006” and the termination of the Head Lease was invalid;
- (2) the Landlord had interfered with the contractual relations between the Tenant and the Subtenant, and had acted unreasonably and without justification by terminating the Head Lease and refusing to allow the Subtenant to use the exterior western wall of the leased premises for advertising and signage purposes; and
- (3) the Subtenant was entitled to damages from the Landlord for its loss of actual client advertising contracts for the period from September 7, 2006 to October 16, 2007 and for its loss of future advertising revenues to October 16, 2007 (the date when the Tenant vacated the premises).

[12] The Landlord appealed.

The Appeal

[13] On appeal to this court, Alexander N. Kovachis and the remaining appellants (the “Kovachis group”) were separately represented and advanced discrete challenges to the trial judgment. For the purpose of his argument, Alexander Kovachis submitted that, even assuming that the termination of the Head Lease was unlawful, the tort of intentional interference with contractual relations and economic interests was not made

out on the trial judge's findings or on the evidentiary record. As a result, he argued, the trial judgment cannot stand.

[14] The Kovachis group adopted Alexander Kovachis' arguments. However, unlike Alexander Kovachis, the Kovachis group also submitted that the trial judge erred by holding that the Landlord's termination of the Head Lease was invalid. On this threshold ground alone, the Kovachis group maintained, the trial judgment is unsustainable.

[15] The Subtenant contested these claims. As against the Kovachis group, it also moved to quash the appeal on the ground of alleged defects in the timing and delivery of the Notice of Appeal filed on behalf of the Kovachis group and, further, on the basis that the Kovachis group allegedly had failed to demonstrate an intention to appeal the trial judgment within the time requirements specified in the *Rules of Civil Procedure*.

[16] Counsel for the Subtenant acknowledged during oral argument that, subject to its motion to quash in respect of the Kovachis group, the tort-based arguments advanced by Alexander Kovachis, if successful, are dispositive of this appeal. Simply put, if the tort asserted was not made out, no relief is available to the Subtenant against the Landlord, regardless of the validity of the Landlord's purported termination of the Head Lease.

[17] Accordingly, at the request of the court, the Subtenant first addressed Alexander Kovachis' tort-based arguments and the motion to quash in its oral submissions. At the

conclusion of argument on those issues, the court allowed the appeal on the grounds advanced by Alexander Kovachis, with reasons to follow. These are those reasons.

(3) Discussion

Tort-Based Claims: The Intention to Injure Requirement

[18] The trial judge was alive to the established elements of the tort of intentional interference with contractual relations and economic interests. In her reasons at para. 40, citing *Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157 (C.A.), leave to appeal refused, [1998] S.C.C.A. No. 608 and *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30 (C.A.), she correctly observed that, to establish the tort in this case, the Subtenant was required to prove three things: (1) an intention by the Landlord to injure the Subtenant; (2) interference by the Landlord, by unlawful means, with the Subtenant's business; and (3) that the Subtenant suffered economic loss as a result of the Landlord's wrongful interference.

[19] The trial judge then stated the following at para. 41, again citing the decision of this court in *Reach M.D.*:

To satisfy the first criterion, it is not necessary for [the Subtenant] to demonstrate that the defendants' predominant purpose was to injure it. The first element of the tort will be met as long as the defendants' acts were in some measure directed against [the Subtenant], even if the defendants' predominant purpose was to advance their own interests.

Counsel for Alexander Kovachis does not challenge this legal principle or the trial judge's enunciation of it.

[20] The trial judge then went on to find that the Landlord “knew about [the Subtenant], its business, and its efforts to secure an agreement with [the Tenant] to use the western wall advertising space” and, further, that the Landlord was “aware of the current and potential effects on [the Subtenant] of their actions in terminating the [Head Lease] ... and refusing to allow [the Subtenant] to use the exterior western wall for advertising campaigns with its clients”.

[21] The trial judge ultimately concluded that, by terminating the Head Lease and refusing to allow the Subtenant to use the exterior western wall of the leased premises, the Landlord acted wrongfully, unreasonably and without justification. In her view, this conduct by the Landlord constituted wrongful interference with the contractual relations between the Tenant and the Subtenant, for which the Landlord was liable to the Subtenant.

[22] I am persuaded that there are two fatal flaws in these holdings by the trial judge.

[23] First, as I have said and as the trial judge noted, proof of an intention by the defendant to injure the plaintiff is an essential element of the tort of intentional interference with contractual relations and economic interests: see for example, *Alleslev-Krofchak v. Valcom Limited* (2010), 322 D.L.R. (4th) 193 (Ont. C.A.), at para. 39, leave

to appeal filed, [2010] S.C.C.A. No. 403. Notably, the intentional acts at issue must be directed, at least in part, against the complaining party – in this case, the Subtenant: see for example, *Lineal*, at p. 159. This, too, was recognized by the trial judge, as above-indicated.

[24] Importantly, the requirement of an intention to injure is not made out where the wrongful conduct at issue was not deliberately targeted against the complaining party but, rather, was simply an incidental or foreseeable result of the defendant's wrongful conduct. The purpose of the unlawful or wrongful conduct must be to inflict injury *on the complaining party*, that is, the plaintiff: see *Cheticamp Fisheries Co-op Ltd. v. Canada* (1995), 139 N.S.R. (2d) 224 (N.S.C.A.), at para. 36, leave to appeal refused, [1995] S.C.C.A. No. 202.

[25] This aspect of the requirement of an intention to injure was explained by Lord Hoffmann in *OBG Limited and others v. Allan and others*, [2007] UKHL 21, at para. 62 in these terms:

Finally, there is the question of intention. In the *Lumley v. Gye* tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been intended are different. ... But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching itself. *On the other hand, one is not liable for loss which is neither a desired end nor a*

means of attaining it but merely a foreseeable consequence of one's actions. [Emphasis added.]

[26] Lord Nicholls of Birkenhead put it this way in *OBG*, at para. 166:

The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must *intend to injure the claimant*. This intent must be a cause of the defendant's conduct ... [Citations omitted; Emphasis in original.]

[27] In my view, it is in connection with this essential aspect of the requirement of an intention to injure that the trial judge first fell into error.

[28] Close scrutiny of the trial judge's reasons regarding this element of the tort reveals that her findings focused on the Landlord's knowledge of the Subtenant and its business, as well as its relationship with the Tenant; that is, on the foreseeability of injury to the Subtenant rather than on any intention by the Landlord to injure the Subtenant. More specifically, the trial judge made no express finding that the purpose of the Landlord's termination of the Head Lease, which led to the Landlord's refusal to permit the Subtenant's use of the exterior western wall, was intended, even in part, to inflict injury on the Subtenant.

[29] Nor, in my view, can such a key finding be inferred from the trial judge's reasons. The trial judge's findings on this issue, noted above, and her reasoning in support of them do not suggest that she viewed the Landlord's acts as targeted in whole or in part against

the Subtenant. Indeed, with respect, it is my view that having properly identified the requisite elements of the tort – including the intention to injure requirement – the trial judge then proceeded on the basis that mere knowledge by the Landlord of the Subtenant's involvement with the Tenant and of the likely consequences to the Subtenant if the Head Lease was terminated and the Sublease was treated as invalid, was sufficient for a showing of an intention by the Landlord to injure the Subtenant. In other words, the trial judge treated the foreseeability of harm to the Subtenant as sufficient to establish an intention to harm the Subtenant. This was an error of law.

[30] There is also a second, critical flaw in the trial judge's treatment of the intention to injure requirement.

[31] As I have said, the trial judge found that the Landlord knew about the Subtenant, its business, its relationship with the Tenant, and the consequences to the Subtenant of the termination of the Head Lease and the refusal to allow it to use the exterior western wall of the leased premises for the benefit of its clients. As detailed in her reasons, her factual finding about the Landlord's knowledge was based on the evidence of two witnesses:

- (1) the evidence of Viktor Lang, the principal of the Subtenant, that during telephone discussions with Alexander Kovachis on September 7 and September 8, 2006, details of the Subtenant's relationship and dealings with the Tenant and of its contracts with its own clients were disclosed; and

- (2) the evidence of Norman Kovachis, Alexander Kovachis' son, to the effect that he and his father were aware of the Subtenant by September 7, 2006 – the date when the Head Lease was terminated.

[32] The Subtenant argues that Norman Kovachis' evidence was hearsay and, hence, inadmissible. While that may be so, his testimony formed one of the two evidentiary cornerstones relied on by the trial judge to fix the Landlord with knowledge that she regarded as sufficient to render the Landlord liable to the Subtenant for damages. And in my view, the trial judge misapprehended the relevant parts of Norman Kovachis' testimony.

[33] The transcripts reveal that Norman Kovachis' actual evidence was that he and his father first became aware of the existence of the Subtenant on September 7, 2006 when his father saw the Subtenant's advertising on the side of the building "when he [Alexander Kovachis] went out to lock [the Tenant] out". Norman Kovachis also said that his father *thereafter* telephoned Viktor Lang to inquire as to why the Subtenant's advertising was present on the leased premises without the Landlord's consent.

[34] Thus, Norman Kovachis' evidence on this issue indicated that the Landlord had formed the intention to terminate the Head Lease and acted on that intention before it became aware of any involvement by the Subtenant. Since there was no evidence from Norman Kovachis establishing that the Landlord had knowledge of the Subtenant when the Landlord determined to terminate the Head Lease, his testimony, even if admissible,

afforded no basis on which to conclude that the Landlord intended to harm the Subtenant in so doing. All the Landlord's subsequent actions in respect of the Tenant and the Sublease in September and October 2006 flowed from its decision on September 7, 2006 to terminate the Head Lease.

[35] Similarly, Viktor Lang's evidence could not ground a finding of an intention by the Landlord to injure the Subtenant at the time of the termination of the Head Lease. Viktor Lang testified that his first conversation with Alexander Kovachis was "on or about September 7, 2006". Thus, his evidence was consistent with that of Norman Kovachis as to the timing of the first contact between the Landlord and the Subtenant. It provided no support for the proposition that the Landlord knew about the Subtenant, its dealings with the Tenant and its economic interests when it formed the intention to terminate the Head Lease and acted on that intention. Accordingly, Viktor Lang's evidence did not provide a foundation for a finding of any intention by the Landlord to injure the Subtenant.

[36] I therefore agree with Alexander Kovachis' submission that the evidence relied on by the trial judge could not anchor a finding of an intention by the Landlord to injure the Subtenant. Notably, the Subtenant was unable to point to any other evidence at trial establishing such an intention. Nor did the Subtenant identify any facts in the evidence from which such an intention, at the relevant time, could be inferred. In my opinion,

therefore, the trial judge misapprehended the evidence that she regarded as establishing knowledge by the Landlord of the Subtenant sufficient to make out the tort.

[37] In summary, on the trial judge's findings and the evidentiary record in this case, I conclude that the asserted tort was not made out. This conclusion is dispositive of the appeal.

The Subtenant's Motion to Quash

[38] In light of my conclusion that the tort of intentional interference with contractual relations and economic interests was not established at trial, it is technically unnecessary to address the merits of the Subtenant's motion to quash. However, as the involvement of the Kovachis group on appeal is relevant to the issue of the costs of the appeal, I will briefly address the merits of the motion.

[39] The Subtenant's main arguments on the motion to quash are that the Notice of Appeal delivered on behalf of the Kovachis group was filed without authority and without subsequent adoption by the Kovachis group and, further, the Kovachis group did not act promptly in initiating an appeal from the trial judge's decision. I would reject these arguments.

[40] Any defect in the service and filing of the Notice of Appeal on behalf of the Kovachis group was a mere technical irregularity. The Notice was filed on behalf of all the appellants by the same law firm that represented all of them at trial. Although an

intervening Notice of Change of Solicitors was filed on behalf of the Kovachis group by a different solicitor, his mandate related only to the issue of the costs of the trial.

[41] More importantly, on the record before us, no member of the Kovachis group has ever asserted that the Notice of Appeal was filed without their authority. The Subtenant's allegation to the contrary must therefore be viewed as speculative and conclusory.

[42] Furthermore, the Subtenant cannot be said to have been taken by surprise or otherwise prejudiced by the involvement of the Kovachis group in the appeal. From the time the Notice of Appeal was filed, the Subtenant was on notice of the Kovachis group's intention to appeal, notwithstanding any arguable defect in the delivery of that Notice.

[43] I would dismiss the motion to quash.

(4) Disposition

[44] For the reasons given, I would allow the appeal and dismiss the motion to quash. The appellants are entitled to their costs of the appeal fixed, in the case of Alexander Kovachis, in the amount of \$12,500, inclusive of disbursements and all applicable taxes and, in the case of the Kovachis group, in the amount of \$4,000, inclusive of disbursements and all applicable taxes.

[45] Alexander Kovachis also seeks an award of the costs of the trial. In this respect, Alexander Kovachis and the Kovachis group are similarly positioned. I would not address the issue of the costs of the trial in the absence of the delivery of written

submissions by the appellants referable to the actual time dockets and billing rates pertaining to the costs incurred by them with their trial counsel in relation to the litigation. Accordingly, if the parties are unable to agree on the costs of the trial, the appellants shall file brief written submissions on this issue, based on their trial counsel's actual time dockets and applicable billing rates, with the Registrar of this court, by January 14, 2011. The Subtenant shall deliver its brief responding submissions within 15 days thereafter.

RELEASED:

"JAN 12 2011"

"EAC"

"E.A. Cronk J.A."

"I agree Robert P. Armstrong J.A."

"I agree G.J. Epstein J.A."