Cite as: Symonds v. Hurst, 2000 NSSC 191

**2000** **S.H. No. 165795**

**IN THE SUPREME COURT OF NOVA SCOTIA**

**BETWEEN:**

**SCOTT SYMONDS**

**Plaintiff**

**- and -**

**GARY HURST**

**Defendant**

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# DECISION

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| **Heard Before:** | **The Honourable Justice Gordon A. Tidman, in Chambers** |
| **Date:** | **October 25, 2000** |
| **Oral Decision:** | **October 31, 2000** |
| **Written Release:** | **January 24, 2001** |
| **Counsel:** | **Mr. George W. MacDonald, for the plaintiff**<br>**Ms. Nancy G. Rubin, for the defendant** |

**Tidman, J: (orally)**

This is an application under the provisions of Civil Procedure Rule 14.25 to strike all or part of the plaintiff's statement of claim on the grounds that no reasonable cause of action is disclosed therein.

The circumstances giving rise to this action briefly are that the plaintiff and defendant with another were partners in an automobile export business known as Cargo Traders Inc. The defendant, Gary Hurst invited the plaintiff Scott Symonds into the business, as I understand, to be the operating partner while the defendant was, among other things, to provide operating capital. A partnership agreement was entered into which contained a five year non-competition clause in the event of a partner leaving the business. At the time of the execution of the agreement Symonds expressed a concern about the clause, but in any event signed the agreement after he says Hurst assured him that the clause could later be revised. No revision took place. Symonds later left the business and soon thereafter sought employment with a competing business.

Symonds' position is that the agreement was not breached as he was led to believe by Hurst that the non-competition clause would be revised. Hurst was unhappy with Symonds for, in his view, breaching the agreement and in words and actions demonstrated his unhappiness to Symonds and their mutual friends.

Hurst also threatened legal action against both Symonds and the competing company with whom Symonds sought employment if the allegedly binding non-competition clause was breached. The competing company did not hire Symonds.

Hurst, as a result of this situation, allegedly was rude and aggressive toward Symonds in the company of their mutual friends and barred Symonds from an eating establishment known as My Apartment in which Hurst had a proprietary interest.

Later, after a round of golf at a local club, Hurst allegedly would not permit Symonds to join him and others at a table where he was seated in the club dining room and using expletives told him to sit elsewhere.

Later, at the same place and on the same occasion, Hurst allegedly said to Symonds, in the presence of mutual friends and maybe others, "Scott, you are nothing but a sleazeball, low life, scumbag and a thief".

Symonds now, by this action, seeks damages from Hurst for:

1) defamation;

2) harassment;

3) intimidation, and

4) inducing breach of contract.

After commencement of the action Hurst, by a demand for particulars, sought the

names of those persons allegedly present at the golf club during the alleged utterances of Hurst. Symonds initially refused to provide the names as not properly being sought by way of a demand for particulars. After the application was commenced the names were provided to Hurst by Symonds.

Ms. Rubin, counsel for Hurst, concedes that the allegation that Symonds is a thief may be actionable in a defamation suit, but no other words spoken are actionable and that neither does the statement of claim ground an action for harassment, intimidation or inducing breach of contract.

Ms. Rubin submits that those sections of the statement of claim relating to the spoken words other than "thief', to harassment, to intimidation and to inducing breach of contract should be struck from the statement of claim.

**The Law:**

Civil Procedure Rule 14.25(1) provides in part:

> The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
> (b) it is false, scandalous, frivolous or vexatious;
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
> (d) it is otherwise an abuse of the process of the court;
>
> . . .

Ms. Rubin submits that the plaintiff cannot sustain a reasonable cause of action in

relation to those items complained of and further due to vague allegations certain paragraphs of the statement of claim are frivolous and vexatious.

**Test:**

The test to be applied in this type of application have been set out in various cases in various ways. One of those is *Vladi Private Islands Ltd. v. Hause et al.* (1990), 96 N.S.R. (2d) 323 (C.A.) wherein MacDonald, J.A. states at page 325:

> an order to strike out a statement of claim will not be granted unless on the facts as pleaded the action is "obviously unsustainable".

In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R., Wilson, J. stated at page 980 and I quote:

> ...assuming that the facts as stated in the statement of claim can be proved, it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of the plaintiff's statement of claim be struck ...

From those statements one may conclude that success will be difficult in an application to strike since the court initially must determine that the claimant has no chance of succeeding.

In this case counsel agree that the various claims in the statement of claim can be broken down into the four separate causes of action earlier set out. I will deal with each one separately.

**First: Defamation**

Ms. Rubin, for the applicant, concedes that if her client called the plaintiff a "thief" such could be actionable, and thus does not seek to strike those portions of the statement of claim relating to that alleged accusation. Ms. Rubin also points out that the accusation imputes the commission of a criminal offence and thus concedes that special damages need not be pleaded in relation to that cause of action. She does however seek to strike the other portions of the statement of claim relating to the alleged name-calling since this is a slander claim and the plaintiff offers no proof of, nor does he seek, special damages.

Ms. Rubin has cited *Brown, The Law of Defamation in Canada* (2nd edition Vol. 1) at page 420 where the author states:

> 8.5 Slander Per Se
>
> Slander is generally not actionable without proof of special damages. There are four recognized exceptions to this requirement. These are:
>
> (1) oral imputations calculated to disparage the reputation of the plaintiff in the way of his or her work, business, calling, trade or profession;
>
> (2) accusations imputing the commission of a criminal offence;
>
> (3) words imputing a loathsome or contagious disease;
>
> (4) words imputing unchastity to a woman.

Ms. Rubin submits that the alleged slanderous words other than "thief" complained of in the statement of claim do not relate to the plaintiff's reputation in the way of his work, business, calling, trade or profession.

Although it may be successfully argued that considering all of the allegations in the statement of claim where it may be gleaned that the parties were former business partners and therefore the alleged accusations relate to the plaintiff's business reputation and thus do not require that special damages be pleaded I would not in any event grant an order to strike the other alleged slanderous words. My reason for refusing to do so is that, in my view, they are all part of the statement in which the word "thief" is alleged to be uttered and should remain as part of the context necessary to understand fully the intent or meaning of the thief portion of the alleged utterance.

Thus, I would dismiss the application to strike those portions of the statement of claim relating to defamation.

**Second: Harassment**

Ms. Rubin contends that in law harassment is not a tort. She says it is simply a collective noun describing a course of action and not a cause of action.

Mr. MacDonald concedes that harassment may be a novel cause of action, but argues that one should not conclude that such a claim has no chance of success.

In support of his argument Mr. MacDonald relies on the herein earlier quoted passage in *Hunt v. Carey,* supra, wherein Wilson, J. stated that the novelty of a cause of

action should not prevent it from proceeding.

Mr. MacDonald points out also that English courts and indeed even a Nova Scotia court have indicated that there may now be such a tort as harassment.

In *Khorasandjian v. Bush*, [1993] Q.B. 727 (C.A.) at 738, Dillion, L.J. stated:

> I find it difficult to give much weight to that general dictum that there is no tort of harassment. . .

In *Fewer v. Michelin North America (Canada) Inc.*, [2000 N.S.J. No. 5 Q.L.] Hamilton, J. of this court made reference to the tort of harassment although offering no comment that harassment is a tort and dismissing the claim.

I accept Mr. MacDonald's submission that the common law is and must be continually evolving. In relation to harassment generally there seems to be some evidence of a societal trend toward supporting generally what some dinosaurs may consider as weakening spines. Thus, the plaintiff should, in my view, have the opportunity of now pursuing that claim. Consequently, I would not strike those portions of the statement of claim dealing with harassment.

**Third: Intimidation**

The plaintiff claims that he was intimidated by the defendant.

Counsel do not disagree that four (4) essential elements of the tort of intimidation are:

1) a threatened illegal act;

2) an intention to injure or cause damage to the plaintiff;

3) compliance with the demand of the threat;

4) damage to the plaintiff.

The basis for the intimidation claim, as I understand it, is that the defendant threatened to sue the plaintiff for violating the non-competition clause contained in the partnership agreement if the plaintiff was employed in a like business.

Ms. Rubin argues that if the defendant threatens to do what he has or reasonably believes he has a legal right to do there is no cause of action.

In support of her argument Ms. Rubin quotes from *Central Canada Potash Co. v. Saskatchewan* (1978), 88 D.L.R. (3d) 609 (S.C.C.) at 640, to wit:

> In my opinion the tort of intimidation is not committed if a party to a contract asserts what he reasonably considers to be his contractual right and that other party, rather than electing to contest that right, follows a course of conduct on the assumption that the assertion of right can be maintained.
>
> I am also of the view that if the course of conduct which the person making the threat seeks to induce is that which the person threatened is obligated to follow, the tort of intimidation does not arise. . .

Mr. MacDonald, for the plaintiff, points out that in the statement of claim the plaintiff

alleges that the defendant promised to revise the non-competition clause. He contends, *ergo*, the defendant's belief of his contractual right to sue was not reasonably held, or, at least, whether or not it was is in issue.

I cannot agree. It cannot be objectively stated that faced with an agreement containing a non-competition clause signed by the plaintiff that the defendant's belief in his contractual right was not reasonably held.

Further, the allegation by the plaintiff is not that the defendant agreed to remove the clause, but only to revise it. The manner of revision is not pleaded.

Consequently, I would strike those portions of the statement of claim relating to the tort of intimidation.

**Fourth: Inducing Breach of Contract**

The plaintiff alleges that the defendant wrongly induced Cargo Traders Inc., the plaintiff's employer, to force his resignation thereby causing his constructive dismissal. Basically, the inducement alleged is that the defendant refused to provide capital to Cargo, as he promised to the plaintiff, so that the plaintiff was no longer able to continue gainful employment with Cargo.

Ms. Rubin also sets out the elements of the tort of inducing breach of contract, Mr. MacDonald does not disagree with them. Those elements are:

1) existence of a valid and enforceable contract;

2) awareness by the defendant of the contract's existence;

3) breach of that contract procured by the defendant;

4) wrongful interference, and

5) damage suffered by the plaintiff.

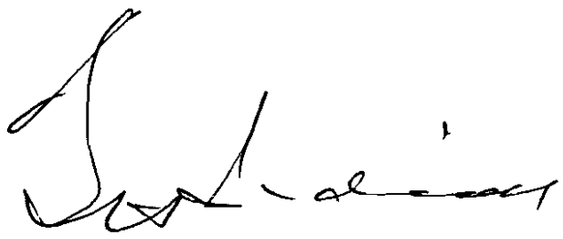
Ms. Rubin submits that the defendant's alleged acts or lack of them were those of a shareholder, and although the alleged promises may be pursued through an agreement between shareholders, they constitute neither wrongful interference nor can they be construed as the procurement of a breach of contract of employment between Cargo and the plaintiff.

Although I agree these are nebulous points, I cannot say with certainty that the plaintiff's arguments are, in law, futile. Consequently, I would not strike those portions of the statement of claim relating to the allegation of inducing breach of contract.

I will leave the consequently necessary editing of the statement of claim to counsel. If agreement cannot be reached I will deal with any disagreement.

**Costs:**

Since both parties have achieved some success in the application I award no costs.



J.