Maryland Law Review

Volume 14 | Issue 2 Article 5

Tortious Interference with Real Estate Contracts - Horn v. Seth

TORTIOUS INTERFERENCE WITH REAL ESTATE CONTRACTS

Horn v. Seth[1]

The defendant appellant was sued by the plaintiff appellee for intentional and unlawful interference with its obligation created by its contract to purchase real estate. Both the plaintiff and the defendant are real estate brokers. A Mr. and Mrs. B listed property for sale with the defendant on a non-exclusive agency basis in 1946. In 1948 a sale having not been made, the B's asked the plaintiff to procure a purchaser, also on a non-exclusive basis. The plaintiff showed the property to a Mr. and Mrs. L, who requested that they be given until the evening of May 24 to make up their minds. The B's approved this arrangement. On the 24th, the defendant showed the property to one Mr. T who indicated an interest to purchase on that very day. The owner went to the plaintiff to see if the L's were genuinely interested. The plaintiff called L who orally agreed to take the property for $12,500, the deposit to be made on that day before 1 P.M. B, after being so informed, returned home to find the defendant there. The defendant stated that T had made an offer of $13,000, and that she further had a deposit check for $1,000. At this time, L called B on the telephone and during the conversation the owner informed L that the price was now $13,000. L agreed to take it at this price and the owner was satisfied. A few minutes later, the owner called L and informed him that the price had gone up to $13,500. L then called the plaintiff who in turn informed the owner that he, the plaintiff, had a $500 deposit. This last phone call was made before 1 P.M. The defendant was present during all these calls, had knowledge of the agreement with the L's, and yet proceeded to induce the owner to sell to T by offering to refund part of her commission. The plaintiff brought action in tort against the defendant for the unlawful interference with his contractual right to the commission, electing not to sue the B's for commission earned. The plaintiff got judgment and the Maryland Court of Appeals affirmed the decision. A dissenting opinion[2] was filed, representing the dissent of two of the five judges.

This action for inducing a breach of contract as it now exists is of comparatively modern origin. The action for

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[1] 95 A. 2d 312 (Md., 1953).

[2] Chief Judge Sobeloff, with whom was Judge Delaplaine.

inducing a servant to breach a contract existed under the early common law of England. Not until the decision in *Lumley v. Gye*,[3] in 1853, was it declared to be actionable to "maliciously" procure another to breach a contract for personal services, although the relation of master and servant did not exist. The term "malicious" when used to describe interference does not mean actual malice or ill will, but the intentional doing of a wrongful act without legal or social justification.[4] In *Temperton v. Russell*,[5] decided in 1893, the doctrine was extended and made applicable to contracts generally. The courts of Maryland have accepted the doctrine and extended the law of torts to actions to recover damages for unlawfully inducing the breach of contracts. Today it is well settled that intentional and unlawful interference with obligations created by a contract, when such contract is known to the interferer, is tortious.[6]

In order for there to be such a tort, the first requirement is the existence of a contractual relationship. Herein is where the difficulty lies. The real question in this case which split the Maryland Court of Appeals was whether or not a contract actually existed. A close examination of the facts reveals that the two brokers, each with their own respective buyers, were actively bidding back and forth for the property in question. This type of bargaining, such as went on in this case, is not unheard of in the real estate business.[7] Here, the plaintiff and defendant were in active rivalry and bargaining continued until a deposit was accepted. The Court felt that a contract to pay plaintiff the commission came into being either when B agreed with the

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[3] 2 E. & Bl. 216, 118 Eng. Rep. 749 (Eng., 1853).

[4] Cumberland Glass Manufacturing Co. v. DeWitt, 120 Md. 381, 87 A. 927 (1913). A question can certainly be raised as to whether or not there was social justification in the Horn v. Seth case.

[5] 1 Q. B. 715, 62 LJQB 200, 412 (Eng., 1893).

[6] Stannard v. McCool, 84 A. 2d 862 (Md., 1951), and cases there cited.

[7] Goldman v. Building Assn., 150 Md. 677, 684, 685, 133 A. 843 (1926).

> "'Iron sharpeneth iron' is ancient wisdom, and the law is in accord in favoring free competition, since ordinarily it is essential to the general welfare of society, notwithstanding competition is not altruistic but is fundamentally the play of interest against interest, and so involves the interference of the successful competitor with the interest of his unsuccessful competitor in the matter of their common rivalry. Competition is the state in which men live and is not a tort, unless the nature of the method employed is not justified by public policy, and so supplies the condition to constitute a legal wrong."
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> "A prudent man may ever conceal from his rival his desire to buy, and one bargaining for property always does 'so with the knowledge of the probability that, until he binds the owner by obtaining an option or a contract, an unknown buyer may intervene, and, without liability to him, purchase the property'."

plaintiff to accept $12,500 or later when L told B he would take the property at $13,500 and B acquiesced. Thus it would seem that a contract comes into being when a broker hears that an oral offer has been accepted but no contract has been signed and no deposit made. This indeed will be a shock to real estate brokers as pointed out in the dissenting opinion.

In real estate transactions it is not uncommon for the competition to become heated. An offer to buy can be withdrawn any time before its acceptance. Acceptance in the real estate business is customarily made by making a deposit with the seller. The haggling over price is only a preliminary leading up to the actual binding contract. As long as the terms are uncertain and are not reduced to writing, a binding contract does not exist. The very nature of these real estate transactions requires that they be reduced to certainty. Furthermore, contracts for the sale of real property must be in writing to be enforceable.[8] The seller of real estate will generally continue to have his property on the market until a deposit is made and a contract is signed. The seller does not want just an oral promise to purchase, but wants a deposit to insure a sale.

In *Richards, Inc. v. Shearer*,[9] a suit was brought by a broker for tortious interference with a real estate contract, whereby he was deprived of his commission. The court very carefully reviewed the law and then stated "The difficulty in the appellant's case is not with the law but with the facts." The evidence failed to prove that a contract had been established and interference had been shown.

The majority in the instant case in reaching its decision relied heavily on the New York case of *Hornstein v. Podwitz*,[10] and the Maryland case of *Stannard v. McCool*.[11] In the former case, there was no competition but only a conspiracy to deprive the broker of his already earned commission. As summarized by the New York Court of Appeals:[12]

> "The complaint herein contains, as amended, all of the essential allegations necessary in a complaint to recover damages for wrongfully inducing a breach of contract. It sets forth the contract and the fact that the

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[8] 29 Charles 2, Ch. 3, Sec. 4, 2 ALEXANDER'S BRITISH STATUTES (Coe's Ed., 1912) 689; White v. Coombs, 27 Md. 489, 501 (1868); Equitable Gas Light Co. v. Balto. Coal Tar Co., 63 Md. 285, 297 (1885); Grauel v. Rohe, 185 Md. 121, 124, 43 A. 2d 201 (1945).

[9] 186 Md. 36, 45 A. 2d 627 (1946).

[10] 254 N. Y. 443, 173 N. E. 674, 84 A. L. R. 1 (1930).

[11] *Supra*, n. 6.

[12] *Supra*, n. 10, 675.

> plaintiff had fully performed, and was entitled to the agreed commissions; that the defendants, with full knowledge thereof, entered into an agreement to deprive the plaintiff of the commissions which he had earned, and to distribute among themselves a sum of money in lieu of the commissions and that, in pursuance of the agreement, the owner allowed to the defendants, Mersel and Hirschorn a part of the sum which it had agreed to pay plaintiff as commissions."

In the latter case, the decision was based on the fact that the evidence did not show knowledge of a contract.[13]

> "There being no evidence in this case from which the jury might reasonably have found that the appellee had knowledge of the facts which created the twelve thousand dollar contract or of the contract, entered into between the appellant and the Nowland heirs, and that knowledge being essential to a recovery of a judgment in this case, the trial judge was clearly correct in entering a judgment N.O.V."

The New York courts have never gone as far as the principal case, as can be seen by examining later cases.[14]

In other jurisdictions, decisions have gone both ways.[15] Real estate counsel might feel that in the instant case the Maryland Court of Appeals should have selected a rule from these cases more in line with accepted practices in the real estate business, but the majority chose not to do so. Today a real estate broker must proceed at his own risk where he learns of a mere oral acceptance of an offer, despite the fact that no deposit has been received and no contract signed.

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[13] *Supra*, n. 6, 867.

[14] Schulman v. Royal Industrial Bank, 280 App. Div. 401, 113 N. Y. S. 2d 489 (1952); Andrews v. Lebis, 279 App. Div. 1013, 111 N. Y. S. 2d 822 (1952); N. A. Berwin & Co. v. American Safety Razor Corp., 108 N. Y. S. 2d 677 (1951); Finkelstein v. Kesalp Realty Corp., et al., 107 N. Y. S. 2d 267 (1951), 279 App. Div. 939, 111 N. Y. S. 2d 282 (1952).

[15] See notes, 97 A. L. R. 1273 and 146 A. L. R. 1417.