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Case Name:

◆ **Clean-Mark Canada Inc. v. Home Depot of Canada Inc.**

Between
Clean-Mark Canada Inc., and
Home Depot of Canada Inc., Heartland Services Ontario
Corp. and Heartland Services Group Ltd.

[2005] O.J. No. 2518
Court File No. 03-CV-255706CM1

Ontario Superior Court of Justice
H.J. Wilton-Siegel J.

Heard: June 6, 2005.
Judgment: June 20, 2005.
(52 paras.)

Civil procedure — Judgments and orders — Summary judgments — Whether genuine issue for trial — Tort law — Interference with economic relations.

Motion by the defendant, Heartland Services Ontario, for summary judgment dismissing the claim against it. The plaintiff, Clean-Mark Canada, brought the action against Heartland and Home Depot following the termination of a contract between Clean-Mark and Home Depot. Clean-Mark submitted bids to provide cleaning services to Home Depot. Clean-Mark was hired to provide cleaning services for six stores in Ontario. Heartland also received six stores to clean. Eventually both Heartland and Clean-Mark both had 28 stores to clean. A store in Barrie was transferred from Clean-Mark to Heartland because of service issues. Clean-Mark was later notified that there were service issues at the Sudbury store and that if these were not corrected in 30 days, the store was going to be transferred to Heartland. Only two days later, Heartland began to advertise for employees in Sudbury. Contrary to the notice period, this store was transferred only a few days later. Home Depot then terminated the contract for the remaining stores and gave 30 days notice. During this period, Heartland's employees went into the stores, but did not displace Clean-Mark's employees. In addition, Heartland approached Clean-Mark's employees and encouraged them to work for Heartland. Six days before the end of the 30-day notice period, all stores were transferred to Heartland. Clean-Mark claimed that Heartland interfered with Clean-Mark's economic relations; breached a duty of care; and was unjustly enriched.

HELD: Motion allowed. Clean-Mark failed to demonstrate a genuine issue for trial regarding the three causes of action. Although there may have been credibility issues pertaining to Heartland's evidence and when it learned of the transfers, these issues did not sufficiently relate to Clean-Mark's action. Clean-Mark failed to plead the specifics of the claim for intentional economic interference. In addition, there was no connection pleaded between Heartland's knowledge of the impending transfers and the claim. Furthermore, Heartland's actions in approaching Clean-Mark's employees and in sending its employees

into the stores before the 30-day notice period had expired followed the termination of the contract and did not affect or result in the termination. There was no claim in negligence apart from the tort of intentional interference in economic relations. Clean-Mark failed to provide details of the specific facts it relied upon to establish a claim for unjust enrichment. Therefore, Heartland was entitled to summary judgment in its favour in respect of all the claims against it.

Counsel:

Gregory Chang and Joga Chahal, for the Plaintiff

John F. Johnson, for the Defendants Heartland Services Ontario Corp. and Heartland Services Group Ltd.

ENDORSEMENT

¶ 1 **H.J. WILTON-SIEGEL J.** (endorsement):— This is a motion for summary judgment brought by the defendants Heartland Services Ontario Corp. and Heartland Services Group Ltd. (collectively "Heartland" or the "defendants"). The action brought by Clean-Mark Canada Inc. ("Clean-Mark" or the "plaintiff") against Home Depot Inc. ("Home Depot") and Heartland arises out of the termination by Home Depot of a contract between Clean-Mark and Home Depot for the provision of janitorial services by Clean-Mark with respect to twenty-nine Home Depot stores in Ontario.

Factual Background

¶ 2 The following factual background is relevant for purposes of this motion. It is based on the facts set out in Clean-Mark's factum. It is understood Home Depot may dispute some of the facts that are not material to this motion.

¶ 3 In or about April, 2002, Home Depot publicly invited companies engaged in the business of cleaning and maintaining commercial premises to apply to and/or to tender proposals to Home Depot to perform janitorial and maintenance services in some or all of Home Depot's retail stores in Canada.

¶ 4 As part of this invitation, Home Depot's maintenance manager, Mr. Zaicos ("Zaicos"), contacted Clean-Mark directly, encouraged Clean-Mark to apply and invited Clean-Mark to an "information seminar" to be held by Home Depot to explain to potential applicants the nature and scope of this program.

¶ 5 On or about April 11, 2002, along with other potential applicants, Clean-Mark attended Home Depot's information seminar, conducted by Zaicos, during which Home Depot discussed the terms and conditions required of successful applicants.

¶ 6 Jonathan Heart ("Heart"), the principal of Heartland, also attended the Home Depot information seminar on April 11, 2002.

¶ 7 On or about April 24, 2002, Home Depot accepted Clean-Mark into the Home Depot program as a successful applicant and contracted with Clean-Mark for services, initially in respect of six retail stores in Ontario. In or about the same time, Home Depot also accepted Heartland into the program, initially with six retail stores in Ontario.

- ¶ 8 On or about May 27, 2002, Home Depot further contracted with Clean-Mark to provide service to an additional twenty-two Home Depot retail stores in Ontario, thereby expanding Clean-Mark's contract with Home Depot to include a total of twenty-eight Home Depot retail stores.
- ¶ 9 By May 2002, Heartland had also acquired an additional twenty-two retail stores, increasing Heartland's retail stores in the program to twenty-eight.
- ¶ 10 In August 2002, Home Depot transferred the Barrie store from Clean-Mark to Heartland. The evidence suggests that this transfer occurred as a result of service issues at this store. After this transfer, Clean-Mark held twenty-seven stores under the Home Depot program and Heartland held twenty-nine stores under the program.
- ¶ 11 On or about September 23, 2002, Home Depot further contracted with Clean-Mark to provide service to one additional store in Ontario, thereby bringing the total number of Home Depot retail stores with Clean-Mark to twenty-eight. The twenty-eight retail stores granted to Clean-Mark represented approximately one-half of Home Depot's Ontario retail stores.
- ¶ 12 Upon its acceptance into the program, Clean-Mark says it immediately began to hire cleaning and supervisory staff in order to meet its obligations under the program, including the cleaning and maintenance of the twenty-eight retail stores seven days per week. Concurrently, Clean-Mark says it also developed an extensive infrastructure to supervise and maintain its contractual obligations.
- ¶ 13 Clean-Mark says it eventually hired approximately one hundred and thirty cleaning employees specifically to meet its contract obligations to service the twenty-eight retail Home Depot stores. Prior to April, 2002, Clean-Mark did not have any cleaning employees.
- ¶ 14 On January 7, 2003, Clean-Mark received an email from Home Depot advising that there were service issues with the Sudbury store assigned to Clean-Mark under the program and that Clean-Mark would have thirty days to correct the service issues. It says that this was the first notice to Clean-Mark of service problems in the Sudbury store and that Clean-Mark took steps to attempt to remedy the service problems.
- ¶ 15 On January 9, 2003, Heartland began advertising in the Toronto Star for cleaning staff in Sudbury, notwithstanding that the only Home Depot store in Sudbury was the store assigned to Clean-Mark.
- ¶ 16 Clean-Mark says that, according to a representative of the Toronto Star, the latest Heartland could have placed this advertisement would have been January 8, 2003, as a minimum lead order time of one day was required for this classified advertisement.
- ¶ 17 Between January 10 and January 15, 2003, contrary to the notice period given in the January 7, 2003 email, Home Depot transferred the Sudbury store from Clean-Mark to Heartland.
- ¶ 18 On February 5, 2003, Heartland began advertising in the Owen Sound Sun Times for cleaning staff, notwithstanding that it did not have any Home Depot stores assigned to it in Owen Sound at the time. The only Home Depot store in Owen Sound was assigned to Clean-Mark at that time.
- ¶ 19 Clean-Mark says that, according to a representative of the Owen Sound Sun Times, the latest Heartland could have placed this advertisement would have been January 29, 2003, as a minimum lead order time of one week was required for this advertisement.

¶ 20 Clean-Mark says that it never received any notice from Home Depot that its performance at the Owen Sound store was unsatisfactory or that consideration was being given by Home Depot to removing the Owen Sound store from Clean-Mark's portfolio.

¶ 21 On February 6, 2003, Home Depot terminated Clean-Mark's contract and transferred all twenty-seven stores previously assigned to Clean-Mark to Heartland. As part of the termination, Clean-Mark was given a thirty-day notice period, which it says permitted it to service those stores until March 6, 2003.

¶ 22 During this 30-day notice period, Heart and the vice president of Heartland, Mr. Bennett, approached Clean-Mark employees and encouraged them to work for Heartland as independent contractors. At no time did Clean-Mark provide its consent to Heartland to approach its employees.

¶ 23 Heartland sent its workers into all the Clean-Mark stores between February 15 and February 22, 2003 to start working on those stores. Heartland says this was at the request of Home Depot. Clean-Mark did not consent to this action. However, it is agreed that the Heartland employees attended during evening shifts and did not displace Clean-Mark employees during this period as the Clean-Mark employees worked day shifts.

¶ 24 On February 28, 2003, six days before the end of the notice period, all of the stores assigned to Clean-Mark were transferred to Heartland, with a corresponding loss of revenue to Clean-Mark.

Legal Standard

¶ 25 The standard on a motion for summary judgment is set out by the Supreme Court in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60 at para. 27 as follows:

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules*, supra, at para. 15).

¶ 26 Of relevance on this motion is the principle that the plaintiff cannot rely on unsupported allegations in its pleadings and the affidavit of its president. As Cullity J. stated in *Confederation Trust Co. v. Alizadeh*, [1998] O.J. No. 408 at (Gen. Div.) para. 5, Clean-Mark has an evidentiary burden to show sufficient evidence of additional facts to demonstrate that there is a genuine issue for trial:

Although the ultimate burden of satisfying the court that there is no triable issue is, and always remains, on [the plaintiff], it is not sufficient for [the defendant] to rely on allegations in his pleadings supported by nothing more than a statement in his affidavit that he believes them to be true. [The defendant] has an evidentiary burden in the sense that there must be sufficient evidence of these additional facts to show that there is a genuine issue for trial: *Re Mastercraft Group Inc.* [1994] O.J. No. 941 (G.D.) at pp. 5-6;

[1995] O.J. No. 884 (C.A.) at para. 10-11; Dawson et al. v. Rexcraft Storage and Warehousing et al., [1995] O.J. No. 2355, (Ont. G.D.), Reasons for Judgment August 10, 1995, at pp. 24-25 and 34-35.

The Issues in the Action against Heartland

¶ 27 The claims of Clean-Mark against Heartland are set out in paragraphs 25 and 26 of the Fresh as Amended Statement of Claim as follows:

25. Heartland Ontario and/or Heartland Group [Heartland] negligently interfered with the economic relations of Clean-Mark and induced, encouraged, or facilitated the breach of contract by Home Depot of its five (5) year contract with Clean-Mark. Furthermore, as a result of the breach of contract by Home Depot and/or the actions of Heartland Ontario, and/or Heartland Group, Heartland Ontario and/or Heartland Group induced, encouraged and/or facilitated the breach of contract between Home Depot and Clean-Mark. Moreover, Heartland Ontario and/or Heartland Group, with or without consideration, improvidently and gratuitously benefited from and bettered itself and/or themselves as a direct result of said breach of contract.
26. As a result of the breach of contract of Home Depot, and the negligence of each of the Defendants [Heartland and Home Depot], Clean-Mark has suffered lost revenues, incurred expenses it cannot recover, lost past and future business opportunities to earn revenue and profit, and suffered other losses, expenses and damages, for which it claims against the Defendants and the particulars of which will be provided at Trial.

¶ 28 The Clean-Mark claims therefore fall into three categories as follows:

1. the tort of interference with economic relations;
2. breach of a duty of care; and
3. unjust enrichment.

Analysis and Conclusions

¶ 29 I would note that there is at least some basis for the plaintiff's suspicion that there was some involvement by Heartland in Home Depot's decision to cancel its contract with Clean-Mark. Home Depot did not merely terminate its contract with Clean-Mark but it also transferred all of the remaining stores to Heartland rather than a third party competitor of Heartland. In doing so, Home Depot denied itself the benefits often alleged to exist by promoting competition between two suppliers as, in fact, existed prior to the termination of Clean-Mark's contract.

¶ 30 However, for the reasons set out below, I have concluded that the plaintiff has failed to demonstrate a genuine issue for trial in respect of any of the three causes of action asserted in its pleadings.

Interference with Economic Relations

¶ 31 The principal claim of Clean-Mark is that Heartland interfered with the economic or contractual relationship between Clean-Mark and Home Depot causing loss to Clean-Mark. I will address this issue by first setting out the legal issues on this aspect of the motion, then summarizing the positions of the parties and finally providing my conclusion.

Legal Issues

¶ 32 In 671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (1998), 40 O.R. (3d) 229, [1998] O.J. No. 2194 (Gen. Div.), Cumming J. addressed the elements of the emerging tort of interference with economic relations as follows:

The essence of this emergent tort is that someone intentionally employs an unlawful means to interfere with a business relationship or business expectancy ... Unlike the tort of inducing a breach of contract, this tort does not require proof that an existing contract has been broken or impaired.

This tort is, in effect, what can be referred to as a "genus tort". That is, it embraces or subsumes a class of specific torts developed historically that have common characteristics. These are traditionally independent economic torts linked to "unlawful means", such as the torts of intimidation, indirect interference with contractual relations and unlawful conspiracy. ...

The elements of the tort of "unlawful interference with economic relations" are: (1) the existence of a valid business relationship or business expectancy between the plaintiff and another party; (2) knowledge by the defendant of that business relationship or expectancy; (3) intentional interference which induces or causes a termination of the business relationship or expectancy; (4) the interference is by way of unlawful means; (5) the interference by the defendant must be the proximate cause of the termination of the business relationship or expectancy; and (6) there is a resultant loss to the plaintiff.

...

It is noted that the defendant's unlawful action must be directed towards the existing business relationship or expectancy of the plaintiff and in circumstances where the defendant should know that injury to the plaintiff is likely. However, it does not matter that the defendant's predominant purpose is to advance her own self interest and not to injure the plaintiff.

¶ 33 The parties agree that the plaintiff has established the elements in sub-paragraphs (1), (2) and (6) above. The issue on the motion is whether Heartland has established that there was no genuine issue for trial because there was no evidence on which a trial judge could reasonably conclude that the plaintiff had demonstrated the elements in sub-paragraphs (3) and (5). The plaintiff also disputes the need to establish unlawful means in sub-paragraph (4). However, since the plaintiff is unable to demonstrate any particular means by which the alleged interference with contractual relations occurred, this issue is moot.

Positions of the Parties

¶ 34 Heartland's position is simply that there is no evidence of any action by Heartland that would constitute interference by Heartland with the contractual relationship between Clean-Mark and Home Depot and, therefore, no evidence of any unlawful means of interference. As a related matter, it also argues that there is no evidence that any loss suffered by the plaintiff occurred as a result of any actions

by Heartland.

¶ 35 The plaintiff makes two principal submissions. First, Clean-Mark says there is an issue of credibility as between the parties generally which would support a finding that Heartland's evidence is not to be believed including, in particular, its evidence that it did not take any action that could constitute interference with the relationship between Clean-Mark and Home Depot. On this basis, it says a trial judge could reasonably disregard both the absence of evidence of any actions by Heartland constituting interference with the contractual relationship between Home Depot and the plaintiff, and Heartland's denial that it took any such actions, and conclude that Heartland did so interfere in some unspecified manner.

¶ 36 Clean-Mark's second submission proceeds from its assertion that there is sufficient evidence for a trial judge to find that Heartland knew there was a possibility that it could acquire the remaining stores in August, 2002. It says a trial judge could reasonably infer that Heartland interfered with the contract between Home Depot and Clean-Mark in some unspecified manner based on (1) the fact of this prior knowledge, and (2) based on Heartland's alleged denial of such prior knowledge, an implied finding that Heartland is not credible generally, and, therefore, should not be believed when it asserts it took no action to interfere with these contractual relations.

Conclusions

¶ 37 I will address each of the principal submissions of Clean-Mark in order and then consider a further issue raised by Clean-Mark. For the reasons stated below, I do not agree that any of the submissions demonstrates a genuine issue for trial.

¶ 38 With respect to the first submission, Clean-Mark has identified four matters which it says demonstrates that Heartland is not credible:

1. the state of Heartland's knowledge after August, 2002 that if there were any future problems with Clean-Mark's stores, Heartland would get the stores;
2. the timing of Heartland's knowledge of the Home Depot decision to give Heartland the Sudbury store;
3. the timing of Heartland's knowledge of the Home Depot decision to give Heartland the Owen Sound store; and
4. the timing of Heartland's knowledge of the Home Depot decision to terminate Clean-Mark's contract and give the remaining stores to Heartland.

¶ 39 I have the following observations with respect to these four matters which are relevant for the conclusions in this Endorsement. With respect to the defendant's state of knowledge after August 2002, I do not see the contradiction between the two statements of Heart, on behalf of the defendants, identified by the plaintiff. On the other hand, on the evidence, it is quite possible, if not probable, that Heart knew there was a possibility of taking over the remaining Clean-Mark stores if there were any further problems with Clean-Mark. With respect to the Sudbury store, there is an unexplained difference between the date Heart says he received notice of the Home Depot decision to give Heartland the Sudbury store and the date of Heartland's placement of an advertisement for staff for that store. With respect to the Owen Sound store, there is an explanation offered by Heart for Heartland's advertisements in advance of the date on which it says it received knowledge of Home Depot's decision. With respect to the timing of Heartland's knowledge of the Home Depot decision to cancel the Clean-Mark contract,

there is a contradiction between Heart's evidence and Zaicos' evidence on behalf of Home Depot to the effect that notification occurred one week before Clean-Mark received notice.

¶ 40 Taken individually or collectively, however, I do not see how these issues are sufficiently related to the plaintiff's action to represent genuine issues of one or more material facts requiring a trial.

¶ 41 The essence of the plaintiff's claim is that Heartland interfered with Clean-Mark's contract with Home Depot. However, the plaintiff does not know, and does not plead, specifics of how this interference occurred. It says there are many options a trial judge might choose. However, it does not propose any particular option because there is no evidence suggesting that any one option is more probable than another or, indeed, that any action was probable. The plaintiff therefore cannot explain how a trial judge would select one scenario over any of the others as being more probable.

¶ 42 In addition, on the evidence before the Court, there is no specific causal connection evident between the defendants' knowledge in respect of these four issues raised above and any particular actions of Heartland that would constitute interference with economic relations. Accordingly, even if each is found in favour of the plaintiff and Heartland is found to have had the early knowledge Clean-Mark alleges, it cannot be said that the plaintiff has a reasonable chance of success in establishing an interference with contractual relations based on such knowledge.

¶ 43 Furthermore, I do not believe there is a significant dispute in respect of the two matters upon which Clean-Mark mainly relies. In both its submissions, Clean-Mark places considerable emphasis on an alleged contradiction in the evidence between two statements on behalf of Heartland as to its knowledge after August, 2002 of the possibility of assuming the remaining Clean-Mark stores. However, I do not see any contradiction between the two statements identified by Clean-Mark. In addition, Clean-Mark also sees great significance in the timing of Home Depot's communication to Heartland of its decision to give the remaining stores to it in February 2003. As there is no concealment issue, but rather a simple difference in recollection several years after the event, I do not see how any inference can be drawn from the fact of these different statements, even though they may be contradictory.

¶ 44 With respect to the plaintiff's second submission, I also cannot see how this issue gives rise to a genuine issue for trial. As mentioned above, I have proceeded on this motion on the basis that it is probable that Heartland had knowledge in August 2002 of the possibility of acquiring the remaining stores if there were any more problems with Clean-Mark's performance. Even assuming this fact, however, it does not automatically follow that Heartland interfered with the contractual arrangement between Clean-Mark and Home Depot and that there is a basis for such a finding on the evidence before the Court. As mentioned above, I do not see any contradiction in Heart's testimony relating to Heartland's knowledge after August, 2002 that raises a credibility issue and, in turn, would permit an adverse inference to be drawn. Also, as mentioned above, the plaintiff does not specify what form the alleged interference took so it is impossible to draw a connection between the state of Heartland's knowledge and the breach alleged by the plaintiff.

¶ 45 I should note that, in the absence of any evidence of financial inducement or arrangement with Home Depot, or other specific improper actions by Heartland, the plaintiff suggests that Heartland could have attracted liability after August 2002 by conducting itself in a manner that made a transfer of the Home Depot stores to it a viable option for Home Depot. Whatever the truth of this allegation, providing good service under a competing contract cannot give rise to a claim for interference with economic relations.

¶ 46 Accordingly, I do not think the plaintiff has a reasonable chance of establishing that the elements of the tort of interference with economic relations have been established.

¶ 47 In addition to its two principal submissions, Clean-Mark also alleges that in February 2003, Heartland interfered in two respects with Clean-Mark's operation of the Home Depot assigned to it. It says that Heartland workers started working in the stores serviced by Clean-Mark during the period February 15 to February 22, 2003, before the expiration of the thirty-day notice period under the contract between Clean-Mark and Home Depot and that, during the same notice period, representatives of Heartland approached Clean-Mark employees and offered them employment with Heartland as independent contractors.

¶ 48 The plaintiff did not place great reliance on these actions as establishing a genuine issue for trial. I conclude that, even if established, neither can constitute evidence of interference with economic relations for the following reasons. The parties agreed that the Heartland employees did not displace the Clean-Mark employees during the notice period but, instead, worked an additional night shift. In addition, Heartland offered employment to the Clean-Mark employees only after Home Depot had served notice of the termination of Clean-Mark's contract and in respect of the period after such termination. These actions followed, rather than affected or resulted in, the termination of the contract by Home Depot.

¶ 49 For the foregoing reasons, therefore, Heartland is entitled to summary judgment in its favour in respect of the plaintiff's claim for damages based on an alleged interference with its contractual or other economic relations with Home Depot.

Negligence

¶ 50 In the first sentence of paragraph 25 of its pleadings, Clean-Mark asserts a claim for negligent interference with economic relations. As I understand the principles of the tort of interference with economic relations, the actions of the tortious party must be intentional. Negligent conduct cannot give rise to a valid claim for interference with economic relations. Clean-Mark acknowledges that its pleadings do not assert a claim in negligence on any other basis. Accordingly, there is no genuine issue for trial with respect to the claim in negligence. Heartland is therefore entitled to summary judgment in its favour in respect of this claim.

Unjust Enrichment

¶ 51 Clean-Mark has provided no details of the specific facts upon which it relies to establish a claim for unjust enrichment independent of any claim it might have for damages based on breach of the tort of interference with contractual relations. Accordingly, there is also no genuine issue for trial with respect to this claim. Heartland is therefore also entitled to summary judgment in its favour in respect of the claim for unjust enrichment.

Costs

¶ 52 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter in accordance with the following schedule. The defendants shall deliver a copy of their submission to the plaintiff within fifteen days of the date of these reasons. The plaintiff shall deliver a copy of its submission to the defendants within ten days of receipt of the defendants' submission. The defendants shall file with the Court a bound volume containing the two submissions and any reply submission within five days of receipt of the plaintiff's submission. Any

such submissions seeking costs shall identify all lawyers on the matter, their respective years of call and rates actually charged to the client and shall include supporting documentation as to both time and disbursements.

H.J. WILTON-SIEGEL J.

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