HYMAN BLOOM AND ISIDORE DWORKIN (DEFENDANTS) ..... } APPELLANTS;

AND

JACOB AVERBACH (PLAINTIFF) ..... RESPONDENT.

1927

*May 10. 11

*May 30.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Partnership—Sale of partners' interests to remaining partner—Good-will—Contract—Alleged uncertainty and insufficiency of terms—Evidence to ascertain what was covered by terms used—Specific performance.

Where a partner for a specific consideration agrees to retire and assigns all his interest in the partnership business to the remaining partners, that assignment conveys to the remaining partners the retiring part-

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

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ner's interest in the good-will without express mention, and, unless it has been specifically agreed that the remaining partners shall pay for it separately, they cannot be called upon to make any additional payment for the good-will, for it belongs to them by virtue of their ownership of the business. (*Gray* v. *Smith,* 43 Ch. D. 208; *Shipwright* v. *Clements,* 19 W.R. 599; Lindley on Partnership, 9th Ed. 541, referred to).

Plaintiff claimed specific performance of an alleged agreement by defendants to sell to plaintiff their interests in a manufacturing business carried on by plaintiff and defendants as partners. The agreement was contained in letters between the parties' solicitors, and the consideration was expressed to be "on the basis of taking the valuation of the building, machinery and fixtures at $15,000" and "stock, etc., to be taken at 100 cents on the dollar." The partnership assets consisted of the factory, including the land on which it stood, the machinery therein, and the articles affixed thereto, the tools, furniture and equipment used, two motor trucks, the stock in trade, and the book accounts. Defendants contended that the good-will also was to be considered as an asset.

Held: The letters showed an agreement sufficiently certain and unambiguous in its terms that the obligations of the parties could be clearly ascertained; on the evidence, including the firm accounts, the parties meant by the words "building, machinery and fixtures," to cover all the physical assets except the stock and the trucks; and by the words "stock, etc.," to cover the stock in trade, the book accounts, and the trucks; and by the words "100 cents on the dollar" that plaintiff was to pay the full present value, as shown on the books. Under the language of the agreement the $15,000 should be taken to include the amount of an existing mortgage on the building. No allowance should be made for good-will, the letters not mentioning it, and the Court finding, on the evidence, that, when authorizing their solicitor to state their terms, defendants had no intention of asking additional consideration for it.

Judgment of the Court of Appeal for Manitoba (36 Man. R. 193), granting plaintiff specific performance of the agreement, affirmed, with a slight variation increasing the amount payable by plaintiff.

APPEAL by the defendants from the judgment of the Court of Appeal for Manitoba (1) which, reversing the judgment of Galt J., granted to the plaintiff specific performance of an alleged agreement by the defendants to sell to the plaintiff their interests in the partnership business carried on by them. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs, with a variation of the judgment below by adding the price of certain motor trucks to the amounts payable by the plaintiff.

C. H. Locke K.C. for the appellants.

E. Lafleur K.C. and *S. Abrahamson* for the respondent.

(1) 36 Man. R. 193; [1926] 3 W.W.R. 741.

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The judgment of the court was delivered by

LAMONT J.—In this action the plaintiff claims specific performance of an agreement made with the defendants for the sale by them of their respective interests in the Chicago Kosher Sausage Manufacturing Company. This company was a partnership in which the plaintiff and defendants were the sole partners. The partnership agreement was a verbal one and was entered into on April 15, 1924. The terms of the agreement appear to have been that the profits should be divided equally; that if any partner desired to withdraw from the partnership he might do so by giving thirty days' notice and he could take with him his share, and that in other respects the terms were to be those embodied in a former agreement between the plaintiff, the defendant Bloom and one Schulman. That agreement contained the following clause:

> In case of any disagreement between the parties as to any matters in connection with the said business or the division of the property, effects or profits or losses in connection with the said partnership, the same shall be determined by Arbitration * * *

Trouble arose among the partners and, about December 1, 1925, Dworkin notified his partners that he wished to withdraw from the partnership. A couple of days later, during a discussion of their affairs, Bloom also signified his desire to withdraw. Dworkin urged the appointment of arbitrators at once; Bloom was willing, but the plaintiff thought it was not necessary until near the expiration of the thirty days set out in the notice. The result of this discussion was that they all agreed to go to the office of the firm's solicitor, Mr. Hyman, on the following Saturday, December 5. This they did. Hyman advised against dissolution but finding it impossible to reconcile the differences existing between the partners he sent them home to think it over and requested each partner to see him privately. They did so but nothing came of it.

On December 12, according to the evidence of defendants and Hyman, there was another meeting in Hyman's office at which all the partners were present and at which the question of arbitration was discussed at length and during which they say the question of the good-will was also brought up. The plaintiff denies being at that meeting. Whether or not he was present is, in my opinion, immaterial, for it is admitted that nothing was accomplished by it.

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The partners were not reconciled nor did they arrive at any agreement as to what was to be done with the business. Hyman testified that it was not decided at the meeting on December 12 who was to continue the business or who was to retire therefrom. Dworkin testified that after the meeting his impression was that they were going to appoint arbitrators. That was the last meeting of the partners. On December 16 the plaintiff engaged the firm of Abrahamson & Greenberg as his solicitors, and the following correspondence took place between that firm and Mr. Hyman's firm which was acting for the defendants.

(1)

December 18, 1925.

MESSRS. HYMAN & HESTRIN,
Barristers, etc.,
McIntyre Block, Winnipeg.

DEAR SIRS:

Re Jacob Averbach, Hyman Bloom and Isadore Dworkin and Chicago Sausage Mfg. Co.

In this matter we were retained by Mr. Averbach. We understand from our client that Messrs. Dworkin and Bloom have expressed their desire to retire from the firm known as Chicago Sausage Manufacturing Co.

Will you be kind enough to let us know on what terms the said parties are prepared to retire, and we will endeavour to have the matter amicably adjusted as far as Mr. Averbach is concerned.

Yours truly,
ABRAHAMSON & GREENBERG. Per S.G.

(2)

19th December, 1925.

MESSRS. ABRAHAMSON & GREENBERG,
Barristers, etc.,
205 Confederation Life Bldg., City.

DEAR SIRS:

Re Averbach, Bloom & Dworkin.

We beg to acknowledge receipt of your letter of the 18th inst. and we have taken up its contents with Messrs. Dworkin and Bloom.

Mr. Dworkin is prepared to retire on the basis of taking the valuation of the building, machinery and fixtures at $15,000, the figures suggested by your client. Stock, etc., to be taken at 100 cents on the dollar.

So far as Mr. Bloom is concerned we are not authorized to make any proposal.

In the event of your client not consenting to the above suggestion, the only alternative remaining is arbitration under the partnership agreement.

Our client insists on an early settlement in any event.

Yours truly,
HYMAN & HESTRIN. Per M.H.

(3)

December 22, 1925.

Messrs. HYMAN & HESTRIN,
Barristers, etc.,
McIntyre Block, Winnipeg.

DEAR SIRS:

Re Averbach, Bloom & Dworkin.

Pursuant to the conversation which the writer had with your Mr. Hyman over the telephone, we hereby, on behalf of Mr. Averbach beg to accept the offer submitted by you on behalf of Mr. Dworkin in your letter of the 19th inst. We also beg to state that the offer is accepted on the understanding that you obtain Mr. Bloom's consent to Mr. Averbach buying out Mr. Dworkin's interest in the business, which consent you undertook to obtain for us.

In regard to our conversation relative to Mr. Bloom, we would request that you let us have his offer in writing, when same will be dealt with. Our client will be prepared to take stock as soon as you advise us of the date acceptable to Mr. Dworkin.

Yours truly,
ABRAHAMSON & GREENBERG. Per S.G.

(4)

23rd December, 1925.

Messrs. ABRAHAMSON & GREENBERG,
Barristers, etc.,
City.

DEAR SIRS:

Re Averbach, Bloom & Dworkin.

We beg to acknowledge receipt of your letter of yesterday's date, in which you, on behalf of Averbach accept the offer submitted on behalf of Dworkin that Averbach pay out Dworkin's interest in the Chicago Kosher Sausage Company.

We must object to the statement in your letter that the offer is accepted "on the understanding that you obtain Mr. Bloom's consent." We undertook to obtain no such consent. What our Mr. Hyman said was that he did not think that Mr. Bloom would have any objection or that any difficulty would arise therefrom.

On behalf of Bloom we are instructed to say that he will retire from the business on the same basis as Dworkin, namely that the building, machinery and fixtures be valued at $15,000.

We take it that inventory of the stock will be taken forthwith by arrangement between the parties.

Yours truly,
HYMAN & HESTRIN. Per M.H.

(5)

December 26, 1925.

Messrs. HYMAN & HESTRIN,
Barristers, etc.,
McIntyre Block, City.

DEAR SIRS:

We beg to acknowledge receipt of your letter of the 23rd inst. and contents noted. In reply, on behalf of our client, we beg to accept the offer submitted by you on behalf of Mr. Bloom. In view of the fact that

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Mr. Bloom is disposing of his interest of the business to our client, it is unnecessary to pursue the controversy raised in your letter in regard to Mr. Bloom's consent. We are prepared to have the matter closed at any day suitable to yourselves.

Yours truly,

ABRAHAMSON & GREENBERG. Per S.G.

The plaintiff offered to complete the purchase on the terms contained in the above letters but the defendants refused to carry out the agreement. The plaintiff then brought this action. The trial judge dismissed the action on the ground that the partners were never *ad idem,* in that the defendants had always insisted on their right to receive consideration for their interest in the good-will of the business, and that the letters made no provision therefor. The Court of Appeal (Macdonald J., K.B., *ad hoc,* dissenting) reversed this decision and directed that the agreement be specifically performed (1). The defendants now seek to set aside the judgment of the Court of Appeal and to restore that of the trial judge, on the following grounds:

1. That the defendants' solicitors had no authority to make the offers contained in the letters.

2. That the agreements contained in the letters are too uncertain to be enforced in that they do not specify what assets were to be included in "building, machinery and fixtures" nor whether the $15,000 to be paid therefor was to be exclusive of the mortgage on the building.

3. That the agreement does not cover all the assets.

4. That in agreeing to the terms contained in the letters, if they did so agree, the defendants understood that the good-will was to be valued and paid for.

In my opinion Mr. Hyman, who wrote the letters of December 19 and December 23, on behalf of the defendants, had from each authority to do so. The defendant Bloom on his examination for discovery admitted that Hyman told him of the letter of 22nd December from the plaintiff's solicitors, and also of the reply of December 23. As to the reply he says he consented to its terms and that the contents of the letter were correct. The defendant Dworkin on his examination for discovery admitted having seen the letter of December 18. He says he did not see Hyman's letter of

(1) 36 Man. R. 193; [1926] 3 W.W.R. 741.

December 19 until after it was mailed, but when he did see a copy of it he approved of its contents. In view of these admissions it is, in my opinion, idle for the defendants now to contend that they did not authorize the offers made on their behalf respectively.

Then do the letters shew an agreement so certain and unambiguous in its terms that the obligations of the parties can be clearly ascertained?

It is suggested that had the letters been handed to a lawyer to prepare a formal contract therefrom, he would not have been able to determine what assets were to be included in the term "building, machinery and fixtures," or what were to be covered by "stock, etc." It may be that he would not, but that is not the test. The test is, did the parties themselves clearly understand what was comprised in each. In other words were their minds *ad idem* as to these expressions?

It is common ground that the partnership assets consisted of,

1. The factory, including the partnership land upon which it was situated, the machinery therein, and the articles affixed thereto, the tools, furniture and equipment used in the factory, and two motor trucks.

2. The stock in trade.

3. The book accounts.

In addition the defendants contend that the good-will was to be considered as an asset.

It is admitted by all parties that by the word "building" they intended to include not only the buildings on the partnership land, but the land as well. As to "machinery" no question arises. "Fixtures" ordinarily mean something attached or affixed to the soil, or to a building forming a part thereof. Here, however, evidence was put in which shews that in the minds of the partners the word "fixtures" had a wider meaning. The defendants put in evidence a loose leaf ledger account shewing a valuation of the physical assets of the partnership, other than the stock-in-trade, under the following heads: "Building Account," "Machinery Account," "Office Fixtures" "Factory Fixtures," and "Cars Account."

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Dworkin in his evidence testified that the "office fixtures" consisted of a safe, two typewriting machines, adding machine, two desks, two chairs, stationery and things of that kind.

In the account of "factory fixtures" were entered such transactions as the sale of a horse and wagon; the purchase of a kettle; the sale of a sleigh, and a slicer.

This evidence, in my opinion, establishes that the term "fixtures" in the minds of the partners covered not only such things as were affixed to the factory, but all the furniture, tools and equipment contained therein, or used therewith. It did not, however, include the two motor trucks which were entered separately under "Cars Account," and were valued at $475.

By the term "building, machinery and fixtures," therefore, the partners meant all the physical assets except the stock and the trucks.

The term "stock, etc.," would clearly include the stock in trade.

As to the book accounts the plaintiff testified that they were "stock," and both defendants admitted that the plaintiff was to pay 100 cents on the dollar for the book accounts. They must, therefore, have understood that they came under the term "stock, etc."

The only remaining assets were the two motor trucks and, as the defendants admit that it was intended that all their interest in the partnership should pass to the plaintiff, they must have understood that the trucks came in under the same heading.

What the partners meant by "100 cents on the dollar" is, I think, also clear. At the trial the defendant Bloom gave the following testimony.

Q. You say you set the $15,000 as the valuation of the building, machinery and fixtures. How were you going to settle on the value of the rest of the things?

A. That is just according to the books.

The books contained a valuation of the various assets of the firm made when the partnership began. This was brought up to date each year by adding thereto the value of additional assets secured, and by deducting therefrom the value of assets no longer in the firm's possession. They shewed the amount allowed in 1924 for depreciation and also the present value of the assets under each account at

the end of the year. When, therefore, the defendant Bloom says they were going to fix the value of the assets, other than the building, machinery and fixtures, according to the books, that, in my opinion, meant that the plaintiff was to pay the full present value, that is the value as set out in the books for 1924, with such deductions for depreciation for the year 1925 as would be reasonable. What these should be the parties themselves have shewn by the entries under date of December 31, 1925, which, for the purposes of computation may, I think, be accepted. It was contemplated that stock would be taken, and they took stock, setting down the raw material on hand and its cost to the firm. They did not reach the point of computing the additional cost to be added for such goods as had been manufactured, but the evidence is that such cost is shewn in the books.

As that is certain which can be made certain by a reference to the books I do not find any uncertainty or ambiguity in the agreement, for the argument that the mortgage on the building was not to be deducted from the $15,000 is, I think, completely answered by the language of the offer itself, and the further contention that Bloom offered to sell only his interest in the building, machinery and fixtures, is answered by his own admission. Unless, therefore, the parties understood and intended that the good-will should be valued and paid for, the agreement covered all the assets and should be specifically performed.

With reference to the good-will, I think it is clear law that where one partner for a specific consideration agrees to retire and assigns all his interest in the partnership business to the remaining partners, that assignment conveys to the remaining partners the retiring partner's interest in the good-will without express mention, and, unless it has been specifically agreed that the remaining partners shall pay for it separately, they cannot be called upon to make any additional payment for the good-will, for it belongs to them by virtue of their ownership of the business. *Gray* v. *Smith* (1); *Shipwright* v. *Clements* (2); Lindley on Partnership, 9th ed., 541.

The agreement as contained in the letters makes no mention of good-will. It is, however, said that it was in the

(1) (1889) 43 Ch. D. 208. (2) (1871) 19 W.R. 599.

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contemplation of the parties that it should be paid for, because at every meeting they discussed the question of arbitration. I have no doubt they did discuss the question of arbitration at each meeting. Dworkin insisted on the partners appointing arbitrators and Bloom agreed thereto. Dworkin, however, in his evidence stated the purpose for which they were to be appointed as follows:

> Q. You say the appointment of arbitrators was for what purpose?
> A. For the purpose of dissolution—winding up the partnership and bringing the whole thing to a head.

The arbitration, therefore, which the parties had in view in their discussions was not, as the defendants tried to make it appear at the trial, for the purpose of valuing the good-will, but it was for the purpose of securing a dissolution of the partnership. It must necessarily have been so. Dworkin had the right to withdraw and get his share. If neither of his partners would purchase his interest the only way Dworkin could get his share was by a dissolution of the partnership and a distribution of the assets. The arbitrators had no power to compel any one partner to purchase another partner's interest. If the partnership was dissolved there could be no question of valuing the good-will, for there would be no good-will to value.

Now on December 12 it was admitted by the defendants and Hyman that no agreement had been reached as to who would buy the others out and that they could see nothing for it but arbitration. That this meant dissolution seems to be borne out by the letter of Mr. Hyman of December 19, where he says:

> In the event of your client not consenting to the above suggestion the only alternative remaining is arbitration under the partnership agreement.

Here arbitration is declared to be an alternative to purchase by the plaintiff. It was an intimation to the plaintiff that if he did not accept the offer there must be a dissolution.

A perusal of the evidence for the defence satisfies me that when the defendants authorized Hyman to state the terms upon which they would retire from the business they had no intention of asking any additional consideration for the good-will.

I am, therefore, of the opinion that the judgment of the Court of Appeal should be affirmed with the variation I have mentioned in respect to the trucks. For these the

plaintiff should pay the value set out in the books under date of December, 1925. The costs of this appeal should be borne by the defendants.

Appeal dismissed with costs.

Judgment below varied.

Solicitors for the appellant Bloom: *Machray, Sharpe, Locke, Parker & Crawley.*

Solicitors for the appellant Dworkin: *Hyman & Hestrin.*

Solicitors for the respondent: *Abrahamson & Greenberg.*