IN THE COURT OF APPEALS 4/9/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00732 COA

KENNETH JOHN CRECHALE

APPELLANT

v.

ROBERT JOHN CRECHALE

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. DENISE SWEET-OWENS

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

DENNIS L. HORN AND SHIRLEY PAYNE

ATTORNEY FOR APPELLEE:

FRANK W. TRAPP

NATURE OF THE CASE: VIOLATION OF TEMPORARY RESTRAINING ORDER

TRIAL COURT DISPOSITION: ORDER DENYING RELIEF TO PETITIONER

BEFORE THOMAS, P.J., DIAZ, AND KING, JJ.

THOMAS, P.J., FOR THE COURT:

Kenneth John Crechale filed a Petition for Citation for Contempt against his half-brother Robert John

Crechale, based upon an alleged violation of a Temporary Restraining Order which had been issued on behalf of Kenneth against Robert. The case went to trial in front of a chancellor who entered an order denying Kenneth John Crechale all relief sought.

FACTS AND PROCEDURAL HISTORY

John Crechale owned and operated Crechale's Restaurant and the property upon which it is located on Highway 80 in Jackson, Mississippi. Robert John Crechale (Bob) and Kenneth John Crechale (Kenneth) are sons of John Crechale but by different mothers.

In 1989, Bob and Kenneth bought Crechale's Restaurant from their father, John. The final arrangement for the sale of the restaurant was that Bob and Kenneth would pay their father John $3, 000 per month for life and after that $3,000 per month to John's current wife for her life.

After working in the restaurant for a couple of years, the two half-brothers, Bob and Kenneth, decided they could no longer work together. Kenneth wanted an immediate dissolution of the property claiming the potential violence between the family members was too great to delay the sale. The brothers ultimately agreed to auction off the restaurant as a going concern. In the end, an agreed order of dissolution was entered in chancery court, and James Bell was appointed as Receiver to maintain the restaurant as a going concern until the sale.

After Bell was appointed as Receiver for Crechale's Restaurant, Bob's mother, Bobbie McCain, started planning a new restaurant called Marcel's. Kenneth claimed that Bob was responsible for opening this competing restaurant and in July of 1991, Kenneth filed for and was granted a 10-day TRO enjoining Bob from opening Marcel's. This TRO prevented Bob from looting the brothers' partnership and from hiring Crechale's Restaurant employees to work at Marcel's or any other competing restaurant during the duration of the TRO.

Crechale's Restaurant was placed for public auction, in which both brothers made a bid. Kenneth bid $480,000; Bob bid $500,000. The restaurant was subsequently sold to Bob for the price of $500,000.

After Crechale's Restaurant had been sold to Bob, Kenneth brought suit against Bob for: (1) contempt, (2) tortious interference with contract, and (3) breach of a fiduciary duty. Kenneth alleged that after the TRO had been entered Bob had: (1) lured away three Crechale employees, including the trained cooks; (2) adopted the design of the Crechale's menu for the Marcel's restaurant; and (3) worked to purchase the equipment necessary to run Marcel's.

It its bench opinion, the court stated:

> I have considered all of the testimony, and the testimony of Judge Bell (the Court's receiver) rings clear, and I am convinced that he is correct when he states that employees told him that they would be leaving Crechale's or had left Crechale's to go to work for Bob (Robert) Crechale at Marcel's. In addition, his testimony was that even a telephone call had been made to Crechale's in response to an ad in the paper that he had caused to run for employees and that that employee was told by Bob (Robert) Crechale that that particular vacancy had been filled.

Even though the trial court found that Crechale employees had left to go work for Bob at Marcel's, the trial court entered an order denying Kenneth relief. The trial court found that there were no damages suffered by Kenneth on account of Bob's actions. In its bench opinion, the court states

> One requirement that must be met in the determination of damages, of course, is that any damages proved can only be awarded where they are reasonably certain, and of course they must be proved to some degree of certainty and accuracy.
>
> In this case I'm perplexed because the documents which were introduced as the gross sales proceeds reflect July 1991 gross proceeds, and they were $69,459. That compared with the 1990 July gross proceeds were $63,308, which is in line with the previous month's gross proceeds, and that reflected each month an approximate 10% increase in gross proceeds from 1990 to 1991 for each month. For example, in February of `90 gross proceeds were $60,193 and in February of `91 they were $64,000, which is an increase of a little under 10%. In March for 1990 they were $66,000; March 1991, $77,000, which reflects a little over 10%, and that seems to be the pattern that the sales have followed, which would indicate that during the month of July there really was very little loss or very little change
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> in the proceeds, the gross proceeds.
>
> Part of Kenny Crechale's argument is that the actions of Robert Crechale damaged Crechale's Restaurant such that he would not bid any higher than the $480,000. Of course, his testimony explains his theory of damages. But this Court finds that they are too speculative for the Court to accept, especially faced with the figures for July of `90 and July of `91.

Then taking it a step further, even if employees--and we're talking about cooks--who were paid $6.00 an hour would not come back to employment at Crechale's, it would take, as he stated, about two weeks to train additional cooks. At most the loss would be any income or revenue from that two weeks. Obviously these employees, given their wages, were not such that they could not be replaced immediately, and from James Bell's testimony they were in fact able to hire additional employees as cooks, waitresses and busboys. So because of the speculative nature of the damages this Court will deny any claim as it relates to actual damages with regard to the sale of Crechale's.

As to the claim of tortious interference (Bob hiring away Crechale employee's for Marcel's) the chancellor also denied Kenneth any relief. The chancellor stated that "[i]n order for such hiring to be actionable there must be a showing of malicious and wanton interference with plaintiff's rights." The trial court found that the "acts of Robert Crechale do not rise to the level of malicious and wanton interference and therefore the Plaintiff's claim for tortious interference with contract is denied."

DISCUSSION

I. WHETHER THE CHANCELLOR ERRED IN DENYING KENNETH RELIEF UNDER THE THEORIES OF CONTEMPT, BREACH OF FIDUCIARY DUTY, AND TORTIOUS INTERFERENCE WITH CONTRACT.

Kenneth's first issue is founded upon three separate causes of action. He argues that Bob's violation of the TRO, as a matter of law, renders him liable for: (1) contempt, (2) breach of fiduciary duty, and (3) tortious interference with contract. We will take each cause of action separately.

A. CONTEMPT

Our standard of review on contempt is straight forward. This Court will not reverse a finding by a Chancellor where such finding is supported by substantial credible evidence. *Shipley v. Ferguson*, 638 So. 2d 1295, 1297 (Miss. 1994). This standard of review applies to contempt matters as well. "[C] ontempt matters are committed to the substantial discretion of the trial court which, by institutional circumstance and both temporal and visual proximity, is infinitely more competent to decide the matter than are we." *Cumberland v. Cumberland*, 564 So. 2d 839, 845 (Miss. 1990). We will not interfere with a trial court's exercise of its discretion unless that discretion be abused. From a careful review of the facts in this case, we cannot say that the Chancellor abused her discretion in failing to find Bob Crechale in contempt.

B. BREACH OF FIDUCIARY DUTY

Next, Kenneth argues that Bob breached his fiduciary duty by hiring away Crechale employees. Before a party can recover for breach of a fiduciary duty, the party must first prove that a fiduciary duty exists. *Lowery v. Guaranty Bank & Trust Co.*, 592 So. 2d 79, 83 (Miss. 1991). "A fiduciary relationship may be formed in a legal context where there emerges 'on the one side an overmastering influence or, in the other, weakness, dependence, or trust, justifiably reposed.'" *Merchants & Planters Bank of Raymond v. Williamson*, No. 91-CA-00615-SCT, slip op. at 4 (Miss. Jan. 12, 1995) (quoting *Miner v. Bertasi*, 530 So. 2d 168, 170 (Miss. 1988)). "A party breaches its fiduciary duty to another 'by actively utilizing some power, control, or opportunity to destroy, injure, or gain a preferential advantage over the party with whom it has a mutual interest.'" *Id.* (quoting *Carter Equip. Co. v. John Deere Indus. Equip.*, 681 F.2d 386, 392. (5th Cir. 1982).

This Court must apply an abuse of discretion standard in reviewing a finding made by a chancellor. However, in the case *sub judice*, the chancellor never ruled on the issue of whether Bob breached the fiduciary duty owed to his brother Kenneth. In *Sunburst Bank v. Keith*, 648 So. 2d 1147, 1149 (Miss. 1995), our supreme court stated:

> Regarding issues of fact as to which a chancellor did not make specific findings, this Court is required to assume that the chancellor resolved such factual issues in the appellee's favor.

We must assume that the chancellor made a finding that Bob did not breach the fiduciary duty owed to his brother and partner Kenneth, and under our standard of review, we cannot say that such a finding would be clearly erroneous.

C. TORTIOUS INTERFERENCE WITH CONTRACT

Over the years our supreme court has developed two separate causes of action: interference with contract and interference with prospective business advantage. *Nichols v. Tri-State Brick & Tile Co.*, 608 So. 2d 324, 329 (Miss. 1992).

Kenneth claims that this Court should reverse the chancellor's ruling because she applied incorrect law. The chancellor found that "a cause of action does not lie where a competitor or others hire an employee who has no employment contract and is an employee terminable at will." Kenneth argues that under Mississippi law it make no difference "whether there was a contract between plaintiff and [the employee] for a definite period of time or not" for there to be a cause of action for malicious interference with business advantage.

Kenneth is correct; in order to prove interference with prospective business advantage, he must prove:

> (1) that the acts were intentional and willful; (2) that they were calculated to cause damage to the plaintiff's in their lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) that actual damage and loss resulted. (Citations omitted).

Nichols, 608 So. 2d at 328 (quoting *Protective Service Ins. Co. v. Carter*, 445 So. 2d 215, 217 (Miss. 1983)).

However, in this case Kenneth did not plead tortious interference with business advantage,

but rather tortious interference with contract. This Court has looked closely at all of the pleadings in the record before us; none of which contain a claim for tortious interference with business advantage.

Under the theory of tortious interference with contract a claim arises when "a party maliciously interferes with a valid and enforceable contract . . . causing one party not to perform and resulting in injury to the other contracting party." *Nichols*, 608 So. 2d at 328 (quoting *Mid-Continent Tel. Corp. v. Home Tel. Co.*, 319 F. Supp. 1176, 1199 (N.D. Miss. 1970). The cause of action only arises when there is interference between the contract of the plaintiff and some third party. *Id.* Without a contract there can be no cause of action.

Kenneth cites this Court to the case of *Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Ins. Co.*, 97 Miss. 148, 52 So. 454 (1910), in support of his argument that a party can recover even though there is no contract between the employer and employee. In that case our supreme court, citing a common law treatise written by Lord Holt, stated that:

> If one maliciously interferes in a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrong-doer. The existence of a *de facto* relation of master and servant has been held sufficient to maintain the action of tort for interference with another's business, as well as the enticement of workmen doing piecework without reference to a time contract.
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> In the modern cases extending the remedy for interference to contracts generally, stress is usually laid on other circumstances, and the existence of a binding contract is not required. If the principle lies in the right of every person to pursue a lawful business, free of molestation, it can make no possible difference whether the maliciously persuaded or intimidated employee is engaged at will or for a term.

Id.

However, in a more recent case, our supreme court has stated in dicta that:

We note that numerous cases from other states recognize that there is no right of recovery on the part of a discharged employee against one said to have interfered with a contract terminable at will. *Rockwell v. Automatic Timing Co.*, 559 F.2d 460 (7th Cir.1977); *Hansen v. Barrett*, 183 F. Supp. 831, 833 (D. Minn. 1960); *Noah v. L. Daitch & Co.*, 22 Misc. 2d 649, 192 N.Y.S.2d 380, 386 (1959); *Luisoni v. Barth*, 2 Misc. 2d 315, 137 N.Y.S.2d 169, 172 (1954); *Davis v. Alwac International, Inc.*, 369 S.W.2d 797, 802 (Tex. 1963); *Kingsbery v. Phillips Petroleum Co.*, 315 S.W.2d 561, 576 (Tex. 1958). These cases procede on the premise that, where there has been no breach of contract, conceptualizing a tortious interference fails as a matter of elementary legal logic.

Shaw v. Burchfield, 481 So. 2d 247, 255 (Miss. 1985).

This observation by the Mississippi Supreme Court calls into question whether the 1910 *Fireman's Fund* holding is still good law. Regardless of the effect of a terminal-at-will contract, the chancellor made a finding that Kenneth was not injured on account of Bob's actions. Without damages there can be no recovery. Thus, neither business interference tort can lead to relief in this case.

II. WHETHER THE COURT ERRED IN NOT AWARDING DAMAGES.

Kenneth claims that since Bob was in contempt of court, breach of fiduciary duty, and tortious interference with contract, the chancellor should have assessed fines, punitive damages, and attorney's fees. However, because we are affirming the chancellor's denial of the above claims, we also affirm the chancellor's ruling not to asses damages.

The law on damages is clear. The determination of damages is left to the sound discretion of the trial court. Furthermore, there can be no recovery where damages are speculative, *Wall v. Swilley*, 562 So. 2d 1252, 1256 (Miss. 1990), or where the damages are uncertain or contingent. *Hudson v.*

Farrish Gravel Co., 279 So. 2d 630, 635 (Miss. 1973). Only when there is evidence which removes the amount of damages from the realm of speculation can there be a recovery. *Wall*, 562 So. 2d at 1256.

In the case *sub judice*, the chancellor made a finding that the proof on damages offered by Kenneth was too speculative. This Court cannot say that the chancellor abused her discretion in so finding.

CONCLUSION

The chancellor acted well within her fact finding discretion in determining that Kenneth failed to prove his claims against Bob as to the elements necessary to find fault and as to particular damages. Since the chancellor failed to find against Bob on any claim, it necessarily follows that Kenneth was not entitled to have Bob assessed with fines, attorney's fees, or punitive damages.

THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT DENYING KENNETH CRECHALE RELIEF IS AFFIRMED. COSTS ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.