Buffalo Law Review

Volume 6 | Number 2 Article 79

1-1-1957

Miscellaneous—Unfair Competition—Similarity of Names

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The policy[47] of the statute which authorizes the setting of the tariff rates is to provide reasonable rates without unjust discrimination against any shippers, and therefore no variance from the traiff schedules is allowed.[48] The Appellate Division,[49] in holding the additional charges applicable, used an "imaginary line" test, saying that once the carrier passed through any door he was removing goods from the interior of the building. However here the provisions of the tariff were ambiguous[50] so that evidence that the customary practice of carriers who dealt with the plaintiff did not make this charge, was helpful in resolving the ambiguity[51] and was not a changing of the legal rates set out in the tariff. "Where the meaning is doubtful, such provisions are to be construed in favor of the shipper."[52] Moreover, the reason for the distinction in the tariff was to compensate a carrier for extra work involved in extra handling, and since here the loading of the carrier could be done in one operation, the justification for the extra charge did not exist.

The Court's use of a reasonableness test in its interpretation of the tariff brings about a more equitable result, although the imaginary line test of the Appellate Division would be much simpler in its practical application in future dealings between carriers and shippers. In any event, the entire problem can be resolved by more explicit language in future tariffs.

Unfair Competition—Similarity of Names

In *Playland Holding Corp. v. Playland Center, Inc.*,[53] plaintiff moved for a summary proceeding pursuant to Section 964 of the N. Y. Penal Law to enjoin

47. N. Y. PUB. SERV. LAW §63(i) 1. It is hereby declared to be the policy of this state to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices . . . .

48. N. Y. PUB. SERV. LAW §63(t) 2. No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, tolls and charges specified in the tariffs in effect at the time. . . .

49. 284 App. Div. 709, 134 N. Y. S. 2d 495 (4th Dep't 1954).

50. See note 46 *supra*. Paragraph (b) seems to uphold the interpretation of the carrier, whereas paragraph (e) seems to agree with the shipper's interpretation.

51. *New York Cent. & Hudson River R. R. v. General Electric Co.*, 219 N. Y. 227, 114 N. E. 115 (1916); MCKINNEY'S STATUTES, book 1 §128, Practical Construction. . . . General Usage, long continued and therefore unquestioned, has much the weight of judicial decision and should not be lightly disregarded. . . . Thus in a doubtful case a construction placed upon a statute by the parties affected, and acquiesed in for a long period, will be followed by the court. . . . When a freight tariff is properly filed and published it has the force and effect of a statute and is often so treated for purposes of construction. *Updike Grain Co. v. Chicago & N. W. Ry.*, 35 F. 2d 486 (8th Cir. 1929).

52. 9 AM. JUR., *Carriers* §144 (1937); *United States v. Gulf Refining Co.*, 268 U. S. 542 (1924).

53. 1 N. Y. 2d 300, 135 N. E. 2d 202 (1956).

defendant, Playland Center, Inc., from using in its amusement park business the name "Playland" and the symbol of a clown's head when advertising such business.[54] Affidavits presented by plaintiff to support such summary proceeding showed that through long use and extensive advertising a secondary meaning had attached to, and identified plaintiff with, such name and symbol; and further showed that defendant had operated his amusement park for a short time close to, and on a main artery to, plaintiff's park with intent to deceive and with resultant deception of the public. Defendant denied an intent to deceive the public and also contended that the name "Playland" and the clown's head were in such general use as not to permit a first user the exclusive right to appropriate them. The Court, reversing the Appellate Division,[55] reentered the injunction, holding unanimously that the evidence sustained the trial court's finding[56] of respondent's guilty intent in using the name and the probability of deception.

A person or corporation who, with intent to deceive, uses a name in advertising which has a probability of deceiving the public as to the party using it, violates Section 964 of the N. Y. Penal Law. This Statute provides as one remedy a special summary proceeding for an injunction which may be decided on affidavits alone.

Since the proceeding involved is summary in nature, the right to injunctive relief must be clearly established;[57] however, mere denial of intent to deceive the public does not establish a true issue of fact requiring a trial and the taking of proof for its resolution. Consequently it will be insufficient in and of itself to defeat the summary proceeding.[58] The requisite intent may adequately be ascertained from the objective facts and it is sufficiently shown if there be conclusive evidence of intent to deceive.[59] The Court felt that the circumstances described in plaintiff's affidavits inferred such intent and therefore became conclusive evidence since defendant did not deny the facts, but merely the intent.

To satisfy the Section it is unnecessary for the plaintiff to show that any person has actually been deceived, probability of deception being enough.[60] Secondary meaning may attach to common words so that in a particular locality

54. *Julius Restaurant, Inc. v. Lombardi,* 282 N. Y. 126, 25 N. E. 2d 874 (1940); Under §964 of the N. Y. PENAL LAW, a proceeding may be instituted by a notice of motion on a verified petition for an order enjoining the use of a trade name with intent to deceive or mislead the public.

55. 285 App. Div. 1075, 139 N. Y. S. 2d 744 (2d Dep't 1955).

56. 206 Misc. 404, 133 N. Y. S. 2d 7 (Sup. Ct. 1954).

57. *Association of Contracting Plumbers of New York v. Contracting Plumbers Ass'n of Brooklyn & Queens,* 302 N. Y. 495, 99 N. E. 2d 542 (1951).

58. *Industrial Plants Corp. v. Industrial Liquidating Co.,* 286 App. Div. 568, 146 N. Y. S. 2d 2 (1st Dep't 1955).

59. *Rayco Mfg. Co. v. Layco Auto Seat Cover Center, Inc.,* 205 Misc. 827, 130 N. Y. S. 2d 108 (Sup. Ct. 1954).

60. *Hirsch v. Perlman,* 51 N. Y. S. 2d 10 (1944), *aff'd.,* 268 App. Div. 1035, 52 N. Y. S. 2d 691 (1st Dep't 1945).

they come to be associated solely with a particular business or product.[61] The Court held it was probable that, because of the extensive advertising and long period of doing business, secondary meaning had attached to the words and symbol in issue and were understood in the locality involved to refer solely to plaintiff's business; thus there was a probability of resultant deception.

In reaching the particular conclusions as to intent and probability of deception, the Court acted correctly, for no other conclusions could reasonably be inferred from the facts presented in plaintiff's affidavits.

Workmen's Compensation—Non-Scheduled Adjustments

A lump sum non-scheduled adjustment of future compensation as provided for under section 15 (5-b) of the Workmen's Compensation Law[62] is binding on neither the employer nor the employee until it has been approved by the Workmen's Compensation Board.[63]

In *Zielinski v. General Motors Corporation*,[64] the question arose as to when such approval may be considered to have been rendered. The employer and the employee had made such an agreement and upon application to the Workmen's Compensation Board, "tentative" approval was obtained. Prior to the issuance of a written opinion, the employee died. The employer, unaware of this fact, sent a check to the deceased employee for the amount of the agreed adjustment upon receipt of the Board's approval. The deceased employee's wife, as administratrix, deposited the check to the account of the estate. In this action of interpleader,[65] wherein both the employer and the administratrix claimed the right to the funds, the Court held (4-3), reversing the Appellate Division,[66] that the deceased employee's estate had no right to the proceeds of the check.

Though a wife can recover any compensation due her husband at the time of his death,[67] it is an elementary principle that the estate of a deceased person

61. *G. & C. Merrison Co. v. Saalfield*, 198 Fed, 369 (6th Cir. 1912), *aff'd. and modified*, 238 Fed. 1 (6th Cir. 1917), *cert. denied*, 243 U. S. 651 (1917).

62. N. Y. WORKMEN'S COMPENSATION LAW §15 (5-b). Non-scheduled Adjustments. . . . The board may, in the interests of justice, approve a non-schedule adjustment agreed to between the claimant and the employer or his insurance carrier.

63. *Dodson v. Healy Co.*, 275 App. Div. 130, 89 N. Y. S. 2d 410 (3d Dep't 1949), *leave to appeal den.*, 300 N. Y. 760, 88 N. E. 2d 534 (1949).

64. 1 N. Y. 2d 424, 135 N. E. 2d 808 (1956).

65. N. Y.CIV. PRAC. ACT §285; A bank may maintain interpleader where the controversy is with respect to a deposit. *Herpe v. Herpe*, 225 N. Y. 323, 122 N. E. 204 (1919).

66. *Zielinski v. General Motors Corporation*, 285 App. Div. 407, 143 N. Y. S. 2d 228 (4th Dep't 1955).

67. N. Y. WORKMEN'S COMPENSATION LAW §33. . . . (I)n the case of the death of an injured employee to whom there was due at the time of his or her death any compensation under the provisions of this chapter, the amount of such compensation shall be payable to the surviving wife or husband. . . .