



[2] The personal defendant says that, with the exception of a personal guarantee which he gave to the plaintiff, the severance contract was with the corporate defendant. The defendants jointly say that the plaintiff was terminated for cause and a severance agreement was ultimately reached to settle all outstanding matters. They further say that the plaintiff breached the severance agreement on multiple occasions as a result of which they were entitled to stop paying the plaintiff the payments provided for pursuant to its terms as of December 9, 2010.

[3] The defendants counterclaim against the plaintiff for the replacement cost of the defendants' property which they say the plaintiff damaged and for cleanup costs. They also claim repayment of any monies paid pursuant to the terms of the severance agreement plus damages for alleged derogatory remarks made by the plaintiff in breach of the agreement plus general damages, costs and interest.

[4] The plaintiff, Lorenzo Cerasani, and the personal defendant, Guido Cerasani, are brothers. For ease of reference, I will refer to them and their brother, Vincenzo Cerasani, by their first names.

[5] By way of background, the defendant corporation carries on the business of an 18-hole golf course, driving range, restaurant and ancillary facilities under the name of Shooters Family Golf Centre ("Shooters"). The business is conducted on adjoining properties, one located at 2731 Main Street and owned

by the corporation, and one located at 3011 Main Street and owned by the parties' mother.

[6] The evidence disclosed that the defendants employed the plaintiff seasonally commencing in May 1998 until August 13, 2010 as a golf course superintendent at Shooters. On August 13, 2010, there was an incident which resulted in the plaintiff's termination although the defendants maintain that prior to then the plaintiff had ceased to perform his duties appropriately, something the plaintiff denies.

[7] It should be noted that a number of the issues and allegations made by the plaintiff against the defendants and by the defendants against the plaintiff relate to a messy family dispute over ownership of 3011 Main Street. It was the subject of a lawsuit initiated by Guido and two corporations, including the corporate defendant in these proceedings, against his mother, Concetta Cerasani, and resulted in a lengthy decision by Simonsen J. dated May 14, 2015 (*Cerasani v. Cerasani*, 2015 MBQB 78, 317 Man.R. (2d) 235). That decision is now under appeal.

[8] To say that there is bad blood between Lorenzo and Guido, as well as other family members, is an understatement. In fact, the numerous unresolved issues in the above-mentioned lawsuit provided the backdrop to the issues before this court in the within action. Numerous suggestions were directly or implicitly made by both brothers in an attempt to discredit the other when, in many instances, they served only to discredit themselves. Both also

demonstrated that they were prepared to play fast and loose with the truth in an attempt to win the court over to their side.

[9] Ultimately, despite the ongoing family dispute and accusations made, the issues in this case were straightforward and came down to the following:

1. What were the terms of the contract entered into between the plaintiff and the defendants?
2. Was the contract breached by the plaintiff or the defendants or both? and
3. If so, what is the measure of damages?
4. Did the plaintiff destroy property belonging to the defendants? and
5. If so, what, if any, damages are owing?

[10] It appears that the precipitating incident on August 13, 2010, which resulted in Guido calling the Winnipeg Police Service, prompted Guido to retain counsel in an attempt to resolve all issues between him and his brother Lorenzo. A proposal similar to one that had been discussed a year previously by "the family" (evidenced by an email that Guido sent to Lorenzo dated July 9, 2009 entitled "Lorenzo Compensation") was put forward by Guido's lawyer to Lorenzo.

[11] An earlier proposal on July 9, 2009 contemplated that Lorenzo would remain on the Shooters' payroll until the end of 2009 and would receive a payment of \$50,000 on November 1, 2009 and again on November 1, 2010. In addition, an agreement would be reached with respect to certain tools and

Lorenzo would receive a cash payment of \$15,000 for them. Not insignificantly, the earlier proposal included a condition that "the family" would agree to transferring the property at 3011 Main Street owned by Concetta Cerasani to Guido or his corporation for approximately \$430,000, which it was suggested in these proceedings, was half the fair market value of the property.

[12] Those "discussions" were renewed in an email and attached letter dated August 16, 2010 from Guido's solicitor to Lorenzo, and ultimately resulted in a letter dated August 20, 2010 signed by both confirming an "all-inclusive settlement agreement". This is the contract which is the subject of this dispute.

[13] The essential terms of the agreement reached August 20, 2010 can be summarized as follows:

1. Lorenzo's employment at Shooters ended Friday, August 13, 2010, "due to differences arising and a mutual decision" that Lorenzo and Guido should part company on "reasonable businesslike terms and get on with the rest of [their] lives";
2. Shooters was to pay Lorenzo \$150,000 in 30 equal, consecutive monthly installments of \$5,000 each starting September 15, 2010;
3. Guido personally guaranteed the payments which would be made by the corporation;
4. The \$150,000 was to be comprised of a severance payment of \$100,000, plus \$50,000 for the purchase of Lorenzo's tools;

5. Lorenzo and Guido undertook “not to speak ill of each other – whether about [their] working relationship at Shooters, the manner in which the other has conducted himself, or in any other respect – at any time in the future, starting now”;
6. Lorenzo and Guido would exchange “mutual releases” of any and all claims they might have against the other in respect of their dealings up to and including August 20, 2010. Both releases were to be “unqualified and unconditional” with the exception that they would be expressly subject to receipt by Lorenzo of the \$150,000 payment in full; and
7. Lorenzo and Guido agreed not to discuss the terms of the agreement with respect to Lorenzo’s severance, or anything else relating to his work at Shooters, with anyone other than their respective spouses. In particular, neither was to divulge the terms of the severance agreement to other employees of Shooters or within the local golf community.

[14] By September 2, 2010, the obligations of the parties had been performed, marked by acknowledgment by Guido’s lawyer of receipt of a bill of sale for the tools and the signed releases, as well as confirmation of the manner in which the \$150,000 was to be paid.

[15] It should be noted that throughout these negotiations, although Guido was represented by counsel, Lorenzo was not. There is no doubt that he was

aware he could obtain independent legal advice and that he declined to do so. This is significant because, despite the agreement to sign mutual releases, the release which Guido signed was not the same as the release that Lorenzo signed. Both releases were prepared by Guido's lawyer.

[16] Significantly, the release signed by Guido contained a clause whereby Shooters and Guido reserved their right to seek their "remedies at law for the purpose of any and all actions, causes of actions, claims, demands, damages, expenses and interest in connection with any false or malicious allegations or disclosure respecting us or our business or personal interests, regardless of when such allegations occurred". Clearly this proviso was not contemplated by the agreement of August 20, 2010 and to which Lorenzo had agreed.

[17] Lorenzo testified that, prior to accepting the terms of the severance agreement, he was concerned about the confidentiality provision contained in the August 16, 2010 letter. He testified that he was expecting another draft after the August 20, 2010 letter confirming the terms of the agreement. He also testified that he never signed the August 20, 2010 agreement although, when presented with a signed copy in court, he was forced to admit that he had signed it and that the signature on the document was his.

[18] There were several other instances arising from his cross-examination where he had to acknowledge important inconsistencies in his evidence. For example, when asked who came up with the amount of \$150,000, he said it was Guido's idea and that he had no input. When it was put to him that the amount

of \$150,000, which had been discussed more than a year previously, related to his purchase of a revenue home for \$120,000 and intention to renovate it, and that he did have input into the amount, he allowed that perhaps he had "misanswered" the question.

[19] There was also an issue about whether Lorenzo had ever provided Guido with a two-page list of the tools he was to be paid for under the severance agreement and the associated prices. While maintaining he had given the list to Guido, which it appears Guido did not receive, he was unable to provide copies of it or any other supporting evidence that he had. This is not insignificant because, by this time, there was no love lost between the brothers and neither trusted the other.

[20] Lorenzo also suggested that he had "many hours" of taped conversations with Guido in which Guido had promised to pay him \$150,000 but was later forced to admit he did not have any taped conversations and this was "inaccurate". These and other inaccuracies did not lend themselves well to a finding of credibility with respect to the weight to be given to the evidence of Lorenzo over all.

[21] Vincenzo, the older brother of Lorenzo and younger brother of Guido, testified on behalf of Lorenzo. Much of his testimony related to the dispute over 3011 Main Street between Guido and their mother. He had testified on her behalf in those proceedings and gave evidence about that, but much of what he had to say was not directly relevant to these proceedings. However, Vincenzo

did testify about the renewed interest on the part of "the family" in reaching a severance agreement between Lorenzo and Guido which ultimately came to a head with the August 13, 2010 incident.

[22] When Vincenzo testified, he gave details about the ongoing family dispute which had been the basis of the earlier court proceedings. It was apparent that he had always been significantly involved in the family dynamics to varying degrees. He had also been copied, off and on, with the correspondence between Guido and Lorenzo relative to the severance agreement and related issues. He told the court that, when the severance agreement was signed in August 2010, he thought "everything was dealt with". He also stated that Guido had asked him to loan him the \$150,000 to pay Lorenzo.

[23] It is interesting to note that, on the date the severance agreement with Lorenzo was signed, Guido registered a caveat against the property at 3011 Main Street claiming a beneficial interest in it. According to Vincenzo, their mother "exploded". I mention this only to show that, whereas all parties maintained that the other proceedings were irrelevant to these, they were ever present and coloured the perspectives and evidence of all of the Cerasanis.

[24] Not unlike the testimony of his brothers, much of the evidence given by Guido was irrelevant to the issues before the court and was designed to cast aspersions on them and their motives in order to promote himself in the eyes of the court. There was little subtlety involved.

[25] For example, it was only on cross-examination that it came out that Guido had asked Vincenzo for \$150,000 to pay Lorenzo. When he was confronted with an email to this effect, he said it was meant to be a "sarcastic joke", although in fairness, and given the family dynamics and previous discussions, it could possibly be true. However, one is left with the impression that, if Vincenzo had indicated any willingness to do so in order to buy peace in the family, Guido would have been happy to take advantage of it.

[26] Guido also testified that his property on Main Street had been vandalized on an ongoing basis, clearly implying that it had something to do with Lorenzo. Oddly, he said he did not remember ever speaking to his brother Vincenzo about it, nor did he have any independent evidence to support this assertion. Furthermore, he never reported it to the police.

[27] Guido also said he was not sending emails to his brother Vincenzo although the evidence clearly showed that Vincenzo had been copied on much of the communication back and forth between Guido and Lorenzo with respect to the settlement. This was how they operated.

[28] Guido gave detailed evidence about the August 13, 2010 incident in which he alleged that Lorenzo, in a fit of rage, bulldozed some of the property he kept at 3011 Main Street. On that occasion Guido did call the police.

[29] The police report indicates they attended at the property and settled things down. Guido acknowledged in cross-examination that he made no further police or other report. When asked, he could not explain why he had not, other

than to say he was "too emotional" and "too distraught". He seemed to be conveniently "emotional" and "distraught" throughout his testimony, and appeared particularly disingenuous when speaking of his beloved mother whom he had sued and with whom he has been engaged in a protracted and bitterly fought law suit for some time.

[30] Guido said he took pictures of the heap of damaged property the night of August 13, 2010 or the next day as proof of Lorenzo's actions and testified the damaged property included a ball bin, aluminum studs, railing, two golf club shafts and some pull carts and tires.

[31] With respect to the "mutual" releases, he agreed that he had reviewed the letter his lawyer sent to Lorenzo which referenced unqualified and unconditional releases with the exception of the \$150,000 payment to Lorenzo. When specifically questioned about his reserving his rights to sue, he said he could not remember if he specifically instructed his lawyer to include this qualification in the release. However, he stated it was his understanding that the release was to "cover off everything, whatever is in the agreement" and that insofar as any damage to property was concerned or matters with respect to the alleged wrongful dismissal, these would be "covered off" as long as the agreement "was kept".

[32] Guido acknowledged that seven payments were made to Lorenzo under the agreement but were stopped when he heard from Gary Pajek and Keith Gibson that Lorenzo was talking about how he could "screw" his brother with

respect to the property at 3011 Main Street. They also told Guido that Lorenzo had talked about some of the terms of the severance agreement including payments of the \$100,000 and \$50,000.

[33] This evidence was confirmed by both Gary Pajek and Keith Gibson, who both testified that these comments were made after the signing of the agreement on August 20, 2013.

[34] When questioned about the alleged breach of the confidentiality provision by Lorenzo and what damages he had suffered, Guido's response was "my reputation". However, he was forced to admit in cross-examination that he had no evidence to support a damage claim nor could he suggest an amount.

[35] Keith Gibson acknowledged that he had had a dispute with Lorenzo over payment for some machinery. He also said he told Guido about the conversation with Lorenzo in January or February 2012 or 2013 and gave Guido a letter to this effect. Although he admitted he had been convicted of fraud, it appears that this happened over 20 years ago and was of little, if any, relevance in terms of assessing his credibility.

[36] Leonard Krolyk testified that he had worked at Shooters cutting grass for seven or eight years and worked for Lorenzo for two or three of them. The import of his evidence, as it related to the issues at trial, was that he saw the pile of rubble depicted in the photographs filed in court to show the property allegedly damaged by Lorenzo. It was his testimony that it was "not normal" for it to be on the property and that he had been asked to come in and clean it up.

## **Analysis and Decision**

[37] As the foregoing indicates, there was no real dispute about the terms of the contract which are set out in the letter dated August 20, 2013.

[38] A number of the issues between the parties can be disposed of briefly.

[39] Insofar as the damage allegedly done by Lorenzo to Guido's property is concerned, I am satisfied that Lorenzo bulldozed some things on his mother's property which at one point he admitted he had done at her request. However, in light of the evidence and the terms of the release, Guido had no legal basis on which to sue for damages.

[40] The agreement was to "cover off" everything that had occurred between the parties up to and including August 20, 2010. Paragraph 7 of the agreement provides for an "unqualified and unconditional" release with the exception of the \$150,000 to be paid to Lorenzo and is with respect to "any and all claims you might have against the other in respect of your dealings up to and including the present time".

[41] To the extent that the release signed by Guido purports to reserve any right to sue, that right is applied "in connection with any false or malicious allegations or disclosure respecting us or our business or personal interests". It does not apply to property damage.

[42] I accept the evidence that, after the severance agreement was entered into, Lorenzo spoke to others about it in breach of the confidentiality provisions. Although Vincenzo testified he was unaware of any such comments being made

by Lorenzo, he is heavily invested in the ongoing family dispute with respect to 3011 Main Street such that his objectivity and the degree of weight that can be placed on his testimony is questionable.

[43] With respect to the evidence of Gary Pajek and Keith Gibson, although not the strongest of witnesses, their evidence is consistent with Lorenzo's behaviour before the agreement was signed and consistent with his strongly held view that he was going to "screw" his brother. As well, the several inconsistencies in Lorenzo's evidence, only some of which have been referred to, raise serious questions about his overall credibility. In the absence of any strong challenge to the evidence of Mr. Pajek and Mr. Gibson, I am satisfied that Lorenzo breached the confidentiality terms of the contract.

[44] Insofar as the measure of damages is concerned, I am satisfied that the evidence before the court, taken in context, is such that the consequence of the breach is not a rescission of the entire contract as argued by the defendants, but rather a repudiation of the contract as a result of Lorenzo's failure to abide by the confidentiality terms. In coming to this determination I rely on the decision of the Manitoba Court of Appeal in *Selkirk Petroleum Products Ltd. v. Husky Oil Ltd.*, 2008 MBCA 87, 231 Man.R. (2d) 1, which sets out the factors a court must consider in determining whether there has been a fundamental breach of a contract or a repudiation of it.

[45] Although Guido made some suggestion that the main reason for entering into the agreement was to shut his brother up, given the evidence that the

agreement had been part of a family discussion long before August 13, 2010, it appears more probable that the main purpose was to end Lorenzo's involvement in the "family" business (albeit as an employee) and put some additional money in his hands, in part for his years of service, but largely because he was a member of the Cerasani family.

[46] There is evidence that by August 2013, Lorenzo was drinking on the job and not fulfilling his responsibilities the way he had in the past. He and his wife were also spending much of the off season out of the country. More importantly, Lorenzo had sided with his mother in the litigation between her and Guido so there were many factors playing into the decision that was ultimately made. What is also clear is that everybody saw the severance agreement as a final resolution to some of the issues plaguing this family including the signatories to it.

[47] In light of the foregoing, I order that the corporate defendant is hereby relieved of making payments to Lorenzo pursuant to the terms of the severance agreement beyond the \$17,500 already made. Guido has no further obligation to honour the payment provisions as guarantor. The contract is considered to be at an end. I further order that the defendants are not entitled to recovery of the \$17,500 paid to date or to any costs or interest thereon.

[48] Given Lorenzo's breach of the confidentiality provisions of the severance agreement, the claim of the plaintiff is dismissed. The counterclaim of the defendants is also dismissed.

[49] The parties may speak to the issue of costs if they are unable to agree.

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McCawley J.