

Ingrisano v Malouf

2021 NY Slip Op 30304(U)

February 1, 2021

Supreme Court, Kings County

Docket Number: 521134/2016

Judge: Karen B. Rothenberg

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS; TRIAL TERM PART 35

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ROBERT INGRISANO,

Plaintiff,

TRIAL ORDER

-against-

Index No.
521134/2016

ANTOINE MALOUF, ROUTE WORLD BROKERS,
AND JOSEPH GONZALEZ,

Defendants.

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The instant matter appeared before me for a bench trial on August 28 and 29, 2019. Plaintiff Robert Ingrisano (hereinafter Ingrisano) alleges that he owned a cake route, and that he and his delivery driver defendant Antoine (Tony) Malouf [hereinafter Malouf] were going to sell the route and split the proceeds. Ingrisano alleges that Malouf sold the cake route out from under him and did not share the proceeds. Plaintiff further claims that defendants Route World Brokers [hereinafter Route World], the broker who facilitated the route sale, and Joseph Gonzalez [hereinafter Gonzalez], the purchaser of the route, knew or should have known through due diligence that the route was not Malouf's to sell.

Ingrisano commenced this action against defendants asserting causes of action for fraud and material misrepresentation (against Malouf and Route World), deceptive business practices (against Route World) and negligence (against Gonzalez).

Prior to trial, plaintiff's and defendants' counselors stipulated that plaintiff's damages would be limited to one half of the sale price of the route (which was \$39,000) and one half of the moneys paid (which was \$10,000) by Ingrisano to distributor American Classic for moneys owing from the route or a maximum of \$ 24,500.

Plaintiff further stipulated at the close of the case that all fraud claims as to defendant Route World were discontinued.

Alfred Fazio of Capuder, Fazio Giacoia LLP, appeared for plaintiff Ingrisano. Eric Milner of Simon & Milner appeared for defendants Route World Brokers and Gonzalez, and Thomas V. Tuffey appeared for defendant Malouf.

Witness testimony

Robert Ingrisano

Ingrisano testified that he and an associate, George Bader, started a bread route business called GRJ Distributors in 2000, and in 2002 they bought a nut and cake route as well. The routes were serviced by drivers they hired to make deliveries. The routes operated out of a mixed-use building that Ingrisano owns in Brooklyn.

In or around 2003/2004 Ingrisano's route business with Mr. Bader ended. Ingrisano then became the sole owner of a cake route business in September 2004, when Mr. Bader introduced him to a Mr. Fadi, who sold him the route for \$17,000 (bill of sale Plaintiff's 1). Attached to the bill of sale is a list of the stops that Ingrisano purchased as part of the route. Ingrisano continued to own the route until March of 2016.

Mr. Bader also introduced him to Malouf, and Ingrisano hired Malouf as a driver. In around 2007, Malouf became the sole driver for the routes. Ingrisano supplied Malouf with a van (and later a replacement van, which was registered to Ingrisano) to make deliveries (Plaintiff's 2, title for 1997 GMC van).

Ingrisano would purchase baked goods from two cake distributors, American Classic and Voila Bakeries. Malouf then picked up the goods from the distributors and stored them awaiting delivery in the van. Ingrisano dealt with Wayne Jeffrey's at American Classic and could not recall the name of the person he dealt with at Voila Bakeries. Mr. Jeffrey's picked up payment from Ingrisano's office once a week. Malouf would pay Voila Bakeries when picking up the orders.

Ingrisano considered Malouf a very good worker and they got along well. Once a week, he paid Malouf a base pay plus commission on cake sold. Malouf collected moneys from the accounts along the route on Ingrisano's behalf and then took his pay out of those collections. Ingrisano kept a log of the commissions earned by Malouf in a commission book (Plaintiff's 3). Ingrisano reviewed the book monthly to get an overview of how the route was doing and which

commissions were owed and/or paid. The first entry was made on August 17, 2012, and the last entry was made on March 23, 2016.

Ingrisano testified that every day, Malouf wrote up receipts for the delivered goods, brought the receipts to the office, wrote up his ledger sheet to indicate all of the stops he made, placed that ledger sheet into an envelope, and dated it for that day. Ingrisano would determine the commissions based on those records, and his bookkeeper, Ms. Prunella, would enter that information into the commission book as well as what had been paid out to Malouf. There were no entries after March 23, 2016, because the route was sold (bill of sale and list of stops, Plaintiff's 4) to defendant Gonzalez for \$39,000 on or about March 25, 2016.

Ingrisano matched up at least 34 original receipts that were in his possession with copies contained in defendant's bill of sale. Ingrisano indicated that stops changed over time as some stops went out of business, he acquired new stops, and stops changed names or location. Ingrisano also matched four (4) stops contained in the bill of sale to Gonzalez with the stops contained in the bill of sale of the routes he purchased from Mr. Fadi in September 2004 (Plaintiff's 1).

Included in the bill of sale to Gonzalez were invoices from Voila which were directed to GRG Distributors at 1809 Stillwell Avenue, and which bore Ingrisano's cell number. Also included were copies of receipts from American Classic which Ingrisano matched to the originals that he maintained. At the top of those invoices, the words Tony AMCL were written. According to Ingrisano, these bills were for his routes and that Malouf (Tony) was the driver. Ingrisano stated that he paid these invoices weekly when Mr. Jeffrey came to his office.

In the summer of 2015, Malouf told Ingrisano that he no longer wanted to work the route. Ingrisano responded that he would actually like to sell the route, pay off the distributors, and split the proceeds of the sale with Malouf, if Malouf would handle the sale. Malouf then put the route on Craig's List and spoke to various brokers. Malouf subsequently told him that he was dealing with a business broker to sell the route, but Ingrisano never signed any documents for the business broker, nor did he learn the name of the broker.

In January or February of 2016, Malouf introduced Ingrisano to Gonzalez. He met Gonzalez on two to three occasions in his office when Malouf and Gonzalez came to the office to pick up cake for the route. Sometime after those

meetings, Malouf told Ingrisano that they needed to put together a list of all the stops on the route and copies of invoices to enable the business broker to verify the volume and profitability of the business. Thereafter, Malouf stopped communicating with him, and when he asked Malouf what was going on, Malouf responded that the route had been sold but he would not reveal the sale price. Ingrisano stated that he never authorized Malouf to sign any documents for the sale of the business.

Sometime after the sale, Ingrisano spoke to the route broker, Ken Leaf, by phone. He explained to Mr. Leaf that he was the true owner of the route to which Leaf responded that Malouf had said that at one time there was another principal involved in the business, but that the principal was no longer involved. Ingrisano told Leaf that when he discussed selling the route with Malouf, they were thinking of selling it for \$60,000, he also explained that he owed American Classic about \$17,000.

Since the van had not been sold along with the route, he gave American Classic the van for a credit of \$3,000 to be applied to debt. He then made a deal with American Classic to settle the remaining debt giving them \$7,000 in personal checks. So, in total, he paid Mr. Jeffrey \$10,000 in settlement of the debt. In addition to seeking half the proceeds from the sale of the route, Ingrisano also seeks \$5,000 from Malouf, half the money that was paid to American Classic.

On cross examination, Ingrisano stated that he always considered Mr. Malouf an independent contractor. He also stated that his own responsibilities included overseeing the route operation, working with suppliers and purchasing goods, directing which stops to service, adding stops to the route, visiting the stores they serviced from time to time, and having office personnel pay bills and keep records. He had weekly conversations with Malouf in which they would discuss clients he could service. When asked about the replacement van for the route, which was in need of repair when it was purchased, he didn't remember whether he or Malouf paid for those repairs. Ingrisano stated that he paid for parking, ongoing repairs to the van, gas, and summonses. He claimed that Malouf used the van most of the time. However, at other times, he or his son used the van. Ingrisano denied that Malouf paid for the use of the van between 2010 and 2016. During that time period, Ingrisano paid for housing the van in Bay Ridge, close to Malouf's home with money from the daily receipts.

Ingrisano further testified that in 2010 whenever Malouf procured new clients, he received commissions on what was sold to those stores. He stated that the route was not profitable, but it provided enough to pay Malouf. He was familiar with the largest clients of baked goods at the time and spent time on the phone with clients whenever it was necessary.

Ingrisano could not explain why the Fadi bill of sale listed 113 stops that were allegedly transferred to Ingrisano in the purchase from Fadi. When asked why the bill of sale does not reference exhibit A or B, he said that the bill of sale states "see attached schedule for locations." Ingrisano did not have any kind of exclusive contract with the stores he serviced. When asked if only three of the stops on the original bill of sale from Mr. Fadi were included on the bill of sale to Gonzalez, Ingrisano stated there were three that he noticed but that there were probably more.

Wayne Jeffrey

Mr. Jeffrey stated that he is employed by Fernando's products which owns American Classic Cakes. Mr. Jeffrey serviced the route for Mr. Fadi prior to Ingrisano purchasing the route. Mr. Fadi introduced Ingrisano to Mr. Jeffrey as the prospective purchaser of the route. Ingrisano was the one who owned that cake and nut route. Malouf, the driver of the route, would call and place an order once a week and then Malouf would pick up the order. Most of the time the bakery enclosed a receipt with the order. He also generated an invoice from his company and left it with the order. Malouf would bring the invoice to Ingrisano and Mr. Jeffrey would then stop by Ingrisano's office to get paid by cash or check.

Mr. Jeffrey testified that Ingrisano told him that the route was sold and that Ingrisano was upset by the price. He testified that Ingrisano signed over a van and made six or seven payments by check. After those payments, the outstanding debt was \$1,500 or \$1,800, but he really didn't care about the remaining balance and considered the debt paid. He also claimed that Ingrisano actually paid him \$17,000 or \$18,000, just about everything that was owed.

On cross examination Mr. Jeffrey said that he had between 20 and 30 accounts but he visited only Ingrisano to obtain payments. Most of the other accounts were owner/operators of their routes so he would see them when they came to pick up goods. Since Ingrisano wasn't driving a route, he would stop at his office on his way home to get paid. Mr. Jeffrey and Ingrisano admittedly maintain

a social relationship. He said the debt Ingrisano owed him built up over time. At some point, Ingrisano told him that if he ever sold the route, he would pay back the debt. He stated that he sold the van that Ingrisano gave him as part payment of the debt. He also stated that Ingrisano paid off the debt by cash and checks but he did not give Ingrisano signed receipts.

Plaintiff rested and moved to conform the pleadings to the proof and for a directed verdict. The court granted the motion to conform to the pleadings and reserved motion for a directed verdict. Defendants Route World and Malouf moved to dismiss plaintiff's complaint and the court reserved decision.

Antoine Malouf

Malouf testified that George Bader introduced him to Ingrisano in 2006, and he began working as a driver for a base salary of \$60 a day. He asked Ingrisano for more money because he was increasing sales. Ingrisano promised him commissions on sales but didn't keep his promise, and never paid him commissions.

Malouf testified that he drove for Ingrisano until 2010. At that point, Ingrisano's nut business ended because the distributor, Mr. Asmar, was not getting paid and refused to supply Ingrisano. Also that year, Ingrisano's van broke down and became unusable. At that point, Malouf began to cultivate his own accounts, starting a route from 69th Street and Bay Ridge to 99th Street. He used a hand truck to make deliveries of products that he had delivered to his home, selling olive oil, energy bars and energy drinks. He built up the route through referrals because he could speak Arabic which 95 % of his customers spoke. He did not consult with Ingrisano about picking up different stores or distributors and never considered him part of his new business.

About two or three months later, Ingrisano called Malouf and told him that he got another van. Ingrisano suggested to Malouf that they form a company together, but that never happened. Malouf claimed that eventually he and Ingrisano came to an agreement wherein Malouf would pay a fee of \$30 a day to use the van which continued through 2016. Malouf also testified that he paid for repairs to the van, gas, and parking summonses. He was not compensated or reimbursed for those expenses. The van broke down numerous times and on one

occasion in particular he called Ingrisano for assistance but Ingrisano told him “this is your business” and hung up.

Malouf further testified that he did get product for his route from American Classic. He would call Mr. Jeffrey on Fridays to place his orders, and he would pick up the order on Tuesdays. After he inspected the product, he paid Mr. Jeffrey directly in cash. He would then go to make deliveries on his route.

The store owners paid him COD. When the store owner paid, Malouf would draw a heart on the receipt and the amount paid, and his name at the top of the receipt. He never took money back to Ingrisano other than to pay him for the van rental.

Malouf said that actually, he was a competitor of Ingrisano’s son Vincent. He claimed that Vincent would go to some of his stops to undersell American Classic goods to them. Malouf stated that his customers remained loyal to him, and continued to do business with him.

After Hurricane Sandy in 2012 or 2013, Malouf wanted to sell the route. He put the route up for sale and did not consult with Ingrisano. Mr. Leaf sent a prospective buyer, Gonzalez, to ride the route with Malouf. Malouf introduced Gonzalez to every account as a potential buyer including Mr. Jeffrey.

Malouf testified that the route business he sold to Gonzalez, which he operated from 2010 to 2016, was his, and his alone.

On cross examination, Malouf stated that he knew how to operate the route because he had owned a deli prior to 2006. He said that from 2010 until he sold the route in 2016, he was both the owner and operator of the route. He neither asked for nor received receipts from Ingrisano for renting the van. He went to Ingrisano each week to pay for the van rental and was never paid any commissions at that time. He claimed that he had about 60 accounts on his route from 2010 to 2016. He rented a parking spot, in a gas station, for the van for \$250 a month. He stored food that needed refrigeration on 75th and 5th Avenue in Brooklyn and stored some goods in his home.

Malouf further testified that when Ingrisano failed to keep his promise to pay him commissions in 2006, he continued to work as a driver because he needed the money and Ingrisano told him he would pay him an extra 50 cents for each box

he sold. From 2006-2010, Malouf said there was only one distributor for the route, the nut distributor.

Malouf testified that when he met Mr. Leaf, he introduced himself as the owner of the route. The sale of the route did not include the van. When Mr. Leaf requested purchase records and sales records, he stated that he gave them to Mr. Leaf, who made copies for him. He stated that he paid Mr. Leaf a commission of \$4,500. When asked why Ingrisano's van was included in the listing agreement, he stated that Ingrisano told him that he didn't have any use for the van and to sell it if anyone was interested. The listing agreement included various invoices that bore the name GRJ Distributors at the top. He claimed the company name was associated with the van he and he could only gain access into certain distributors if there was a company name associated with the van.

The listing agreement provided for the sale of the business at a price of \$55,000. The rider to the listing included "cake route and owner GRJ". He contacted Voila and asked them to send Mr. Leaf a year's worth of invoices, since he only had three months of invoices from Voila. He also contacted American Classic to do the same but Mr. Jeffrey refused. When asked how Mr. Leaf got the documents from American Classic, he stated that he found some invoices and gave them to Mr. Leaf.

Malouf indicated that the route was actually sold for \$39,000. Malouf received a check for \$28,000 and a promissory note from Gonzalez for \$6,000. Gonzalez has only paid \$420 on the promissory note. Malouf has a lien on Gonzalez's van. Malouf stated that Gonzalez no longer operates the route. When asked about a copy of a receipt that was included in the listing agreement, Malouf stated that the owner of the store had the original receipt. When asked if it's true that he didn't have original receipts and that he went into Ingrisano's office to make copies, he stated no.

Malouf stated that after he stopped operating the route, he left the receipts in the van. Malouf was asked to look at a Voila receipt that was dated approximately a year before the sale of the route and was included in the bill of sale. When asked how Ingrisano had the original receipt and produced it during his testimony, and why Malouf did not have the original, Malouf stated that he didn't know. When questioned about his testimony of having left three months' worth of receipts in the

van yet the receipt in question was dated a year prior to the sale of the route, Malouf stated that it might have been together with the other receipts in the van.

Defendant Malouf rested.

Defendant Route World called Kenneth Leaf.

Kenneth Leaf

Mr. Leaf, president of Route World Brokers stated that he is a business broker who specializes in the sale of distribution routes primarily in wholesale food businesses. Malouf contacted him in late 2015 and wanted to sell an unfranchised cake route. Mr. Leaf met with Malouf on two or three occasions. At some point in time, Malouf provided Mr. Leaf with the data and documents he needed including a list of the customers and a sampling of receipts to see what percentage Malouf was working on. He also requested purchase information from Malouf's two main wholesalers. Voila faxed that information. The information from American Classic was not provided. He claimed that prior to signing the listing agreement with Malouf on September 28, 2015, Ingrisano did not contact him and he was not aware that anyone other than Malouf owned the cake route. He stated that he had brokered other transactions involving American Classic and that it was not odd that American Classic did not provide purchase records.

Mr. Leaf further testified that he set up a meeting between Malouf and Gonzalez where Gonzalez spent time with Malouf helping him out along the route. Gonzalez never indicated to Mr. Leaf that he was introduced to Ingrisano. Malouf represented that he owned the business and had clear right and title to sell the business. Closing took place on March 25, 2016. Both parties waived counsel for the sale. Mr. Leaf received a \$5,000 brokers fee.

Mr. Leaf stated that there is no way of verifying the owner of a non-franchised route. He met Malouf in Brooklyn to get the listing and the van was on the listing agreement. Mr. Leaf copied the VIN number from the windshield and wrote it on the listing agreement. Mr. Leaf personally went to see the van twice. He assumed Malouf owned it. He did not check DMV records, registration, or license plates to confirm ownership. He further stated that in order to get the information he needed from American Classic, he came up with a formula to verify the numbers. He never spoke to anyone at American Classic to either verify that Malouf owned the route or to get copies of the documents he needed. He stated

that he notified Gonzalez that he was not in possession of any invoices from American Classic.

After evaluating the business, Mr. Leaf adjusted the sale price of the route because the numbers were lower than Malouf represented. Malouf eventually provided some receipts from American Classic. Mr. Leaf did not remember how many months of receipts were provided. The route was sold for \$39,000 on March 25, 2016. Although Leaf's standard fee is ten percent or a minimum of \$4,500, because of the additional work required to verify the value of the business, Mr. Leaf received \$5,000. The van was not ultimately included in the contract of sale because the buyer did not want the van. Initially, he asked Malouf if he was incorporated because then the listing would have been different. He did not ask Malouf if he had any creditors as it was not part of his practice to ask sellers if they had creditors. Mr. Leaf was not aware that Gonzalez was not making payments on the \$6,000 promissory note. He obtained the copies of American Classic invoices from Malouf who provided a sampling, not a full year's worth.

Leaf used Blumberg forms for the contract and the security agreement between Gonzalez and Malouf. He had each of them execute a waiver as to being represented by counsel.

On cross examination, Leaf indicated that he did not check the registration of the van through the Department of Motor Vehicles, but it was not part of the ultimate sale. He considered Gonzalez prequalified but did not do any investigation or require any documentation as to his finances.

The court noted that defendant Joseph Gonzalez failed to appear for trial, and no counsel appeared on his behalf

Findings of fact and conclusions of law

Route World acted as a business broker in a transaction for the sale of a route business from Malouf to Gonzalez which closed on or about March 25, 2016. Neither party to the contract was represented by counsel. Kenneth Leaf on behalf of Route World prepared all contracts and closing documents. The question presented for trial actually boils down to whether Ingrisano held an ownership interest in the route business sold by Malouf.

It is uncontroverted that Malouf was never an employee of Ingrisano and was working for Ingrisano as an “independent contractor” until 2010. In 2010 the relationship changed. Malouf was no longer paid \$60 per day, and Malouf started his own route and expanded it from just nuts to include olive oil, energy bars and energy drinks. Malouf’s testimony as to how he built a new route business was credible.

The testimony also indicates that Ingrisano was aware that Malouf was negotiating a sale of the route business. Nonetheless, he played no role in those negotiations and he never inquired about them. Ingrisano’s total lack of interest or participation indicates that he had no interest in the sale. The sale was not a secret, in fact Malouf brought the buyer, Gonzalez, to meet Ingrisano on more than one occasion. It is not credible that Ingrisano made no inquiry of Gonzalez and did not introduce himself as the owner of the route at any time.

Based on the totality of the credible testimony and evidence produced, the court finds that Ingrisano has failed to meet his prima facie burden of proving that he had an ownership interest or rights to the route at issue. Even if certain clients on Malouf’s own route overlapped with those that Ingrisano once serviced, Ingrisano had no exclusivity agreements with any of his customers.

Moreover, even assuming, *arguendo*, that Ingrisano established an ownership interest in the subject route, he fails to establish his causes of action for fraud and material misrepresentation against Malouf, or his cause of action for deceptive business practices against Route World, or his cause of action for negligence against Gonzalez and/or Route World.

The elements of a cause of action sounding in fraud consists of “ ‘a material misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury’ “ (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Here, there is no testimony or evidence establishing that Ingrisano relied upon a misrepresentation made to him by Malouf, or anyone else, to his detriment. Rather, it appears that Ingrisano’s claim is that Malouf made misrepresentations to Gonzalez with respect to the ownership of the route in order to conduct the sale. However, third-party reliance cannot establish the reliance

element of a fraud claim. It is settled law that “the tort of fraud is intended to protect a party from being induced to act or refrain from acting based on false representations – a situation which does not occur where, as here, the misrepresentation were not communicated to, or relied, on by plaintiff” (*see Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817 [2016]).

To establish a prima facie showing under GBL §349 or §350, it must be demonstrated that a defendant engaged in (1) consumer-oriented conduct that is (2) materially misleading; and (3) resulted in injury to plaintiffs (*see Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940 [2012]). “The threshold requirement of consumer-oriented conduct is met by a showing that the acts or practices have a broader impact on the consumer at large in that they are directed to consumers or potentially affect similarly situated consumers” (*Cruz v NYNEX Information Resources*, 263 AD2d 285, 290 [1st Dept 2000][internal quotation marks and citations omitted]). “Consumers,” are generally defined as “those who purchase goods and services for personal, family or household use” (*Medical Socy. of State of N.Y. v. Oxford Health Plans, Inc.*, 15 AD3d 206, 207 [1st Dept 2005] [internal quotation marks and citations omitted])

Ingrisano’s causes of action under GBL §349 and §350 fail because it is not demonstrated that Ingrisano was a “consumer” within the meaning of the statute (*People v Northern Leasing Systems, Inc.*, 169 AD3d 527, 528 [1st Dept 2019] [internal quotation marks and citations omitted]). Even assuming otherwise, because GBL §349 and §350 are directed at wrongs against the public at large, “private...disputes which are unique to the parties do not fall within the ambit of the statute[s]” (*Yellow Book Sales and Distribution Co., Inc. v Hillside Van Lines, Inc.*, 98 AD3d 663, 665 [2d Dept 2012]; see also *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 24-25 [1995]). As Ingrisano’s claim is based on harm to his business interest, and not based on a harm to the consuming public, he fails to establish consumer-oriented conduct under GBL §349 and §350 (*see Plavin v Group Health Inc.*, 35 NY3d 1 [2020]). Furthermore, even if all other requirements were met, Ingrisano’s claim would still fail because he did not prove that he fell victim to any misrepresentations or false advertising by Route World in this matter (*see Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 55 [1999]).

In order to prevail on a negligence claim, “a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Solomon v. City of New York*, 66 NY2d 1026, 1027 [1985]). In the absence of a duty, however careless the conduct or the foreseeable the harm, there can be no liability (*see Lauer v. City of New York*, 95 NY2d 95, 100 [2000]). Here, Ingrisano fails to establish that either Route World and/or Gonzalez owed him a fiduciary duty or any other duty of care.

Based on the foregoing, judgment is awarded to the defendants on all causes of action.

Dated: February 1, 2021

Enter,



Karen B. Rothenberg
J.S.C.