121 Me. 534
Supreme Judicial Court of Maine.

STACHOWITZ
v.
BARRON-ANDERSON CO.

Oct. 6, 1922.

Synopsis
Exceptions from Superior Court, Androscoggin County, at Law.

Action by Isaac **Stachowitz** against the **Barron-Anderson Company**. Judgment for plaintiff, and defendant brings exceptions. Exceptions sustained.

West Headnotes (3)

[1] **Contracts** Uncontroverted Evidence

It is a question of law whether given conduct is a breach of a contract.

2 Cases that cite this headnote

[2] **Labor and Employment** Modification or Rescission of Contract

Where a contract of employment was modified by mutual consent after and in view of the closing of employer's factory, the closing of the factory could not be a breach.

[3] **Labor and Employment** Weight and Sufficiency

A letter stating that employee had no grievance at the time, as there was nothing due him at such time, held not to show an anticipatory breach of contract.

***378** Argued before CORNISH, C. J., and SPEAR, PHILBROOK, DUNN, WILSON, and DEASY, JJ.

Attorneys and Law Firms

Benjamin L. Berman, of Lewiston, and Jacob H. Berman, of Portland, for plaintiff.

William H. Newell, of Lewiston, for defendant.

Opinion

DEASY, J.

The sealed contract between the parties, dated June 13, 1921, whereby the defendant agreed to employ the plaintiff as pressman in its Lewiston factory for one year from that date, was about September 5, 1921, as hereinafter appears modified by mutual agreement. The defendant moved its factory to Boston. It paid the plaintiff his wages in full to September 10th, and offered to either (1) employ him in Boston for the remainder of the contract term, or (2) pay him $600 to cancel the contract, or (3) provide work for him in Lewiston in connection with its Boston factory. The plaintiff accepted the third alternative, as appears by the following letter:
"Auburn, Me., Sept. 5, 1921.

Dear Mr. Barron: I have decided to stay in Lewiston and do your work that you will send me over, for it is towards winter and I don't see what I can do otherwise.

Respectfully yours, Isaac **Stachowitz**."

On September 10th, the day to which he had been paid his wages, the plaintiff brought this suit. It was heard by the justice of the superior court without a jury, and judgment ordered for the plaintiff for $2,128.

Conceding that the findings of particular facts are conclusive, the defendant reserves exceptions to two rulings. As the second exception must be sustained, it is unnecessary to prolong this opinion by further reference to the first. The second exception is to the following ruling:

> "That on the 10th day of September, at the time this action was commenced, there had been a breach of the covenant on the part of the defendant by closing its factory and removing the business to Boston, terminating the plaintiff's

> employment, for which the plaintiff had a right of action."

[1] This is in part a conclusion of law. Whether given conduct can be legally held a breach of a certain contract-i. e., whether capable of being so held-is a question of law. Connor v. Giles, 76 Me. 134.

[2] The contract which alone was in force on September 10th was made after, and in view of, the defendant's closing its factory and removal to Boston. It is obviously impossible that there could have been any breach caused by such closing and removing.

[3] The exception must be sustained, unless it appears that the error is harmless, and the excepting party must ultimately fail upon the facts admitted to be true. Orr v. Oldtown, 99 Me. 194, 58 Atl. 914; Hathaway v. Crosby, 17 Me. 452. This is the plaintiff's claim.

***379** He urges that the defendant, though it had paid the plaintiff his wages to the date of suit, had renounced the contract, repudiated all future liability under it, and had thus given the plaintiff a right of action for anticipatory breach, as held in Sutherland v. Wyer, 67 Me. 64.

But the letter from the defendant's attorney relied upon for the purpose fails to show a repudiation of future liability on the contract. The letter dated September 9th reads:

> "I find that your client has no grievance at this time, since he has been paid for all services rendered, and there is nothing due him at this time."

This letter states the situation with precision. The plaintiff had no grievance "at this time" (September 9th). There was nothing due the plaintiff "at this time." There was no suggestion of repudiation of the only contract then in existence between the parties, to wit, the contract made by the defendant's offer and the plaintiff's written acceptance of September 5th. The plaintiff had not "been discharged and prevented from the further execution of" the contract, as was true in Sutherland v. Wyer.

At the date of the beginning of the action there was nothing due the plaintiff for services rendered; nothing on the contract of June 13th, for that had been superseded by a modified contract, and the modified contract had not been violated or renounced by either party.

Exception sustained.

All Citations

121 Me. 534, 118 A. 378